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THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW

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THE ESSENTIALS

OF

INTERNATIONAL PUBLIC LAW

BY

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OF THE RUSSO-JAPANESE WAR"

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TO

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PREFACE

This work — the product of considerable experience in the study and teaching of International Law — aims to furnish the teacher and student with an up-to-date text adapted to the needs of the classroom, and also to present the specialist as well as the general public with a scientific treatise on the subject.

In the execution of this task, the author has tried to be as clear and concise as possible; and, in the body of the text, has carefully confined himself to what he regards as the "Essentials of International Public Law." Minor and controversial details have, for the most part, been relegated to the footnotes. These footnotes are intended to serve a double purpose: to furnish bibliographical and other data for a more extended study or investigation of particular topics; and to provide an additional text for a longer course than is commonly given. It is hoped that the book may thus be readily adapted to a longer or shorter course at the discretion of the instructor.

In the main, the work is based upon modern or contemporary, as distinguished from the older, sources and authorities. A special attempt has been made to review the more important of the many recent contributions to International Law contained in monographs and periodicals — Continental as well as Anglo-American. In the parts dealing with the Law of War and Neutrality, the illustrations are drawn largely from recent wars.

It has been deemed best to incorporate into the body of the text (with notes by way of commentary) those parts of International Law which have been officially codified, viz. the Hague Conventions and the Declaration of the London Naval Conference of 1909.

In the organization of the subject, the writer has adopted the newer and, as he believes, the more convenient as well as scientific system of classification. The Law of Peace is thus mainly divided into "Subjects" and "Objects" of International Law; the Law of War, into Land, Maritime, and Aërial Warfare. The Adjective Law of Nations is dealt with in Part IV under the heading "Settlement of International Disputes."

It is due to the *American Journal of International Law* to state that the historical chapters, as also the chapters on "The Succession of States" and "Aërial Space" have been previously published in that excellent periodical.

In conclusion, the author wishes to express his gratitude to his friend and colleague Professor Samuel Bannister Harding for valuable advice and assistance in the preparation of this volume.

BLOOMINGTON, INDIANA,
September 1, 1912.

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LIST OF ABBREVIATIONS

A. I. — Instructions for the Government of the Armies of the United States in the Field.
A. J. — American Journal of International Law.
Am. Law Rev. — American Law Review.
Am. Pol. Sci. Rev. — American Political Science Review.
Annals. — Annals of the American Academy of Social and Political Science.
Annuaire. — Annuaire de l'Institut de droit international.
Contemp. Rev. — Contemporary Review.
D. L. — Declaration of London.
Fortn. Rev. — Fortnightly Review.
G. C. — Geneva Convention.
H. C. — Hague Convention.
H. R. — Hague Regulations.
Int. J. of Ethics. — International Journal of Ethics.
J. C. L. — Journal of the Society of Comparative Legislation.
J. D. I. — Journal de droit international privée (Clunet).
L. Q. R. — Law Quarterly Review.
N. R. G. — Nouveau recueil générale de traités.
Nat. Rev. — National Review.
No. Am. Rev. — North American Review.
Philos. Rev. — Philosophical Review.
R. D. I. — Revue de droit international et de legislation comparée.
R. D. I. P. — Revue générale de droit international public.
Rep. I. L. A. — Report of the International Law Association.
S. C. — Stockton's Naval War Code or Laws and Usages at Sea.
Tableau. — Tableau générale de l'Institut de droit international.
Zeitschrift. — Zeitschrift für Völkerrecht und Bundesstaatsrecht.
* — To emphasize the interest or importance of a particular work or treatment of a particular subject. It is often used to emphasize availability rather than intrinsic importance.

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THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW

ESSENTIALS OF INTERNATIONAL PUBLIC LAW

INTRODUCTION

CHAPTER I

THE NATURE OF INTERNATIONAL LAW

1. **Definition of International Law.** — *International Law*, or the Common and Conventional Law of Nations, is that body of principles, rules, and customs which are binding upon the members of the International Community of States in their relations with one another or with the nationals of other States.[1]

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[1] For various definitions of International Law, see *1 Calvo, § 1; 1 F. de Martens, *Traité*, § 3; *1 Pradier-Fodéré, *Traité*, § 1; and Ullmann (2d ed.), 9–10 n. Halleck (Baker's 3d ed., I, 46) simply defines International Law as "the rules of conduct regulating the intercourse of States." This definition has the great merit of simplicity, but is too inclusive. There are "rules regulating the intercourse of States" which are not, properly speaking, a part of the Law of Nations. International Law is generally and habitually, though not always, observed; but in this respect it does not differ from municipal or State law, the rules of which are also frequently violated.

Certain authorities (*e.g.* Liszt, 3d ed., § 2, p. 13) distinguish between *general* (*allgemeines*) and *particular* International Law. But rules which are not generally or universally recognized as binding can scarcely be said to deserve the name International Law at all. Oppenheim (I, p. 3) distinguishes between *universal* in contradistinction to *particular* and *general* International Law. So many divisions are confusing and unnecessary. According to some authorities (*e.g.* Despagnet, No. 41; and 1 Pradier-Fodéré, No. 6), the Law of Nations includes a *theoretical* or ideal, and a *real* or actual International Law. They explain that the latter tells us what the law *is*, and the former what it *should* be. This distinction is undoubtedly a sound one, but this volume deals mainly with *positive* or real International Law.

Some writers (*e.g.* Heffter, § 1; and Holtzendorff, in 1 *Handbuch*, §§ 3–4) speak of a European International Law. While it may be readily admitted that the Grotian system is essentially of European origin, the application and development of the Law of Neutrality is largely due to American statesmen and publicists. The South American publicist Alvarez (14 *R. G. D. I.*, 1907, 393–405, and 3 *A. J.*, 1909, 269–353) even speaks of an American International Law. Such terms are too narrow, and their use tends to interfere with a broad conception of international relations.

2. **The Term International Law.**—The term "International Law"[2] appears to have been coined by Jeremy Bentham in 1780 and is the one generally in use at the present time, although the phrase "Law of Nations" (a translation of *Droit des Gens*—the title of Vattel's famous work published in 1758) is still sometimes employed.

The former term is preferable to the latter, inasmuch as *Droit des Gens* is a translation of the Latin *jus gentium*[3], —a phrase which bore a very different meaning from that of "International Law." Grotius' great work, published in 1625, was entitled *De Jure Belli ac Pacis*. Early English writers employed the term "Civil Law,"—a phrase still used by Locke toward the close of the seventeenth century.

3. **Necessary Distinctions.**—International Public Law should be carefully distinguished from International Ethics or Morality, International Comity or the Comity of Nations, International Policy or Diplomacy, International Private Law or Conflict of Laws, and International Administrative Law.

4. **International Ethics.**—*International Morality* deals with the principles which should govern international relations from the higher standpoint of conscience, justice, or humanity. Without certain standards of international morality, International Law could not exist, and many of its principles (as, *e.g.* respect for treaties) are conditions essential to friendly and stable international intercourse. Although the Law of Nations is based largely upon a sense of justice and equity among men, international morality is by no means identical with International Law;[4] for the latter fails to condemn certain practices and prin-

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[2] The term "Interstate Law" would be somewhat more exact than "International Law," which is a translation of the phrase *jus inter gentes*, used by Zouche as a part of the title of his manual published in 1650 (republished by the Carnegie Institution in 1911 as Vols. I and II of the *Classics of Int. Law.*) On the terminology of our subject, see especially Bonfils (Fauchille), No. 3; *Creasy, pp. 3 ff.; Despagnet, No. 37; Holland, *Jurisprudence* (10th ed.), 380 n.; *Holtzendorff, in 1 *Handbuch*, § 2; Lawrence, *Principles* (4th ed.), § 7; Liszt (3d ed.), 1–2; *1 Pradier-Fodéré, No. 3; 1 Rivier, 4–6; Ullmann, § 3; 1 Walker, *History*, § 1; Wheaton, § 12.

[3] See *infra*, § 38.

[4] As Pollock (*First Book of Jurisprudence*, p. 44) justly observes: "Though much ground is common to both, the subject matter of Law and Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct."

ciples (as, *e.g.* the right of conquest) which are clearly at variance with ideals of justice and humanity, and it includes many rules which originated in interest and convenience rather than in morality.[5]

5. **The Comity of Nations.** — *International Comity* relates to those rules of courtesy, etiquette, or good will which are or should be observed by Governments in their dealings with one another on grounds of convenience, honor, or reciprocity. Such, for example, are the extradition of criminals in the absence of express agreement; the observance of certain diplomatic forms and ceremonies; and the faith or credit given in each State to the public acts, records, and judicial proceedings of other States.[6]

6. **International Policy or Diplomacy.** — *International Policy* or *Diplomacy* in the wider sense[7] relates to objects of national or international policy and the conduct of foreign affairs or international relations. It is generally based upon considerations of expediency or national interest rather than upon those of courtesy, humanity, or justice. Though its aims and methods should never be illegal or immoral, it must be admitted that its conduct in times past has generally been Machiavellian in-

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[5] Hall (6th ed., 1 ff.) wisely makes the "existence of rules of positive International Law the sole standard of conduct or law." He argues: (1) that "it is not agreed in what the absolute standard consists"; and (2) that "even if a theory of absolute right were universally accepted, the measure of the obligations of a State would not be found in its dictates, but in the rules which are received as positive law by the body of States." But he also "unhesitatingly" affirms that "essential facts of State existence and moral obligations which are recognized as being the source of legal rules possess a much higher authority than any other part of International Law."

[6] Comity is the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." Justice Gray, in *Hilton* v. *Guyot* (1894), 159 U.S. Rep. 113, 164. But this definition is too narrow.

For examples of requests for the extradition of criminals on grounds of courtesy, see 4 Moore, *Digest*, § 582.

[7] "Diplomacy in the narrower sense may be defined as the art of conducting the intercourse of nations with one another." Foster, *American Diplomacy*, p. 2. Twiss (I, p. 163) points out that it is a science as well as an art. He defines diplomacy as "the science which is conversant with Negotiations and Treaties." In the wider sense, "a history of diplomacy properly includes not only an account of the progress of international intercourse, but an exposition of the motives by which it has been inspired and the results which it has accomplished." See preface to the first volume of Hill's monumental work, *The History of European Diplomacy*.

stead of Grotian. While there has undoubtedly been great improvement in standards of diplomatic conduct, especially since the close of the Napoleonic wars, the fact has not been sufficiently recognized, at least by publicists, that beyond the well-cultivated field of International Law there still lie vast and but partially unexplored regions of policy where motives of interest and expediency prevail rather than ideals of law and justice. The aims and methods which govern international relations in these fields of policy or diplomacy may and should be in harmony with established laws and customs, but are often independent of, and sometimes even antagonistic to, recognized rules and principles. At any rate, statesmen exercise a wider discretion and feel less bound by legal checks and moral standards in the realm of International Policy or Diplomacy than within the narrower field bounded by definite rules of positive International Law. The abuse of this freedom frequently leads to intervention and war.[8]

7. **International Private Law or Conflict of Laws.** — *International Private Law*[9] or *Conflict of Laws* is that body of rules or principles which decide between two conflicting systems of law in the decision of cases affecting private rights. It is not a part of International Law proper, and appears to owe its origin to a feeling of comity[10] rather than to a sense of justice, although it now rests upon a more positive basis. "It derives its force from the sovereignty of the States administering it; it affects only the relations of individuals as such; and it consists in the rules by which courts determine within what national jurisdiction a case equitably falls, or by what national force it is just that it shall be decided."[11] It relates especially to such mat-

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[8] Nys (*Le droit int.*, I, p. 204) quotes von Holtzendorff as saying that "international politics is the use of an international force acting in the interest of the community." He (Holtzendorff) cites the following discriminating words of Bulmerincq: "Law leaves no choice; policy keeps open various means to an end and permits a free choice in respect to these." (See Bulmerincq, in Marquardsen's *Handbuch*, I, § 3.) For a discussion of this subject from an ideal standpoint, see Novicow, *La politique int.* (1886).

[9] The term International Private Law seems more exact than Private International Law — the phrase usually employed. *Conflict of Laws* is perhaps preferable to either.

[10] See *Hilton* v. *Guyot*, 159 U.S. 113, 164–165; and Story, *Conflict of Laws*, Nos 28, 33–38.

[11] Hall (6th ed.), p. 51.

ters as limits of national jurisdiction; validity of foreign marriages, wills, and contracts; and questions of residence, domicile, and nationality. It is a part of the municipal law in each State and of the common law in England and the United States.[12]

8. **International Administrative Law.** — International Administrative Law — a branch of international jurisprudence which is still in its infancy — has been tentatively defined as "that body of laws and regulations created by the action of International Conferences or Commissions which regulate the relations and activities of national and international agencies with respect to these material and intellectual interests which have received an authoritative universal organization."[13] It relates to such matters as international communication by means of postal correspondence and telegraphy, international transportation, copyright, crime (*e.g.* the white slave traffic), sanitation, etc. It is created by International Congresses or Conferences, and Commissions, and is administered by International Commissions and Bureaus as well as by national agencies.

9. **Is International Law a Branch of True Law?** — The claim of International Law to be considered a branch of true law or jurisprudence proper has been often denied, more especially by that English school of analytic and positive jurisprudence founded by Bentham and Austin. The Austinian or imperative view of law, which has also found some support on the Continent, seems to-day to be rejected by an overwhelming weight of authority, except possibly in England and the United States.[14]

The objections to considering International Law as a branch of true law fall under three main heads. It is maintained that the Law of Nations lacks: (1) The quality of positive authority or command. It does not conform to Austin's definition of law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[15] In other words, it is not the general command of a determinate legislator or legislative body with power to enforce its decisions. (2) There is no legal duty or obligation of obedience on the part of those to whom it is addressed, for there are no courts or judicial tribunals to interpret and enforce this so-called law. (3) There is no penalty prescribed for disobedience. Consequently, it lacks sanction or physical power to enforce obedience. The so-called Law of Nations is, it is claimed, a branch of ethics rather than of jurisprudence.[16]

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[12] Wharton, *Conflict of Laws*, I, § 1. Minor (*Conflict of Laws*, § 2) thus distinguishes International Private Law from International Public Law: (1) as to persons on whom it operates, *i.e.* on private persons; (2) as to transactions to which it relates, *i.e.* to private interests; (3) as to remedies applied, *i.e.* these are applied by courts or tribunals. In the United States, the States are regarded as sovereign from the standpoint of Conflict of Laws.

[13] Reinsch, in 3 *A. J.* (1909), 5.

[14] For lists of authorities for and against the Austinian or imperative view of law, see bibliography at the end of this chapter.

It is now generally agreed that the Austinian view of law is formal, narrow, arbitrary, unhistorical, and unphilological.[17] While it may still have some value for those who practice and administer law in the courts, it does not even furnish a complete definition of municipal law, as many laws are permissive rather than mandatory in their character. It leaves out of account that large and important part of constitutional law which is based upon usage or convention and is not directly administered by judicial tribunals.

The researches inaugurated by Sir Henry Maine and Savigny, the founders of the modern school of historical jurisprudence, have shown that custom is anterior to enacted law, of which indeed it remains the essence even after it has become incorporated into codes and statutes and interpreted by the courts. Even Holland admits that judges do not transform custom into law, for they apply it " retrospectively " as well as " prospectively." They merely place upon it " the stamp of judicial authentication." [18]

Leading authorities even maintain that physical sanction or the threat of physical force is a mere accident and is not an essential characteristic of law. It is but a means to an end— a part of the machinery of society for the enforcement of law.

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[15] *Cf.* Holland's definition of law as " a general rule of external human action enforced by a sovereign political authority," in *Jurisprudence* (10th ed.), 40.

[16] In this paragraph I have sought rather to summarize the objections generally made to the legal nature of International Law than to state the specific objections of Austin.

[17] This last point has been elaborated by Clark, in his *Practical Jurisprudence*, Pt. I, chs. 2–7. For a summary of the philological argument, see Walker, *Science of International Law*, 21 ff.

[18] Holland, *op. cit.*, p. 58.

Far more important than the infliction of punishment is the creation of a law-abiding sentiment among the people.[19] Besides, the laws to which the severest penalties are attached are not always those most generally or scrupulously obeyed.[20]

Law in jurisprudence is essentially a body of customs, principles, or rules for the regulation of the external conduct of human beings in their relations with one another as members of a political community.[21] In order fully to answer the description of law, these rules must be generally recognized as binding and enforceable by external power or appropriate sanction, but they are not necessarily accompanied by the threat or use of physical force in case of their violation. The guarantees or sanctions securing their observance need not be based upon the assertion of force or the danger of speedy and definite punishment. The guarantees for International Law, and still more for the customs and conventions of constitutional law, are mainly of a moral nature; and these rest upon public opinion and law-abiding habits on the part of the people for their observance.[22] Besides, we cannot admit that International Law lacks altogether a determinate lawgiver and sovereign authority.[23] European Congresses, like those of Paris in 1856 and the recent Hague Conferences, exercised virtual legislative powers and issued commands which have been recognized as binding and are generally obeyed. The thirteen Conventions of the Second Hague Peace Conference of 1907 (compared with the three Conventions of the Conference of 1899) bear witness to the increasing activity and importance of international legislation. True it is that these Conventions bear the form of treaties which each State may refuse to sign and ratify, but they are none the less in essence acts of international legislation.[24]

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[19] This is a summary of Walker's argument. See *op. cit.*, pp. 29 ff.

[20] From the point of view of general recognition and habitual obedience, International Law certainly compares favorably with municipal or State law. For example, treaties are, as a rule, faithfully executed, and arbitral decisions are nearly always carried out. The rules of warfare have been generally observed during recent wars between civilized States. Even in violating the Law of Nations, modern governments usually render to it the homage of pretended obedience.

[21] *Cf.* the definitions of Oppenheim, I, § 5, and Clark, p. 134. For numerous definitions of law, see Clark, chs. 4–14, and Holland (10th ed.), pp. 41–43.

Pollock (*First Book*, etc., p. 28) justly observes that "the only essential conditions for the existence of law and legal institutions are existence of a political community and the recognition by its members of settled rules binding upon them in that capacity." But he had previously observed (p. 22) that "the appointed consequences of disobedience, the *sanctions* of law as they are commonly called, seem to be not only a normal element of civilized law, but a necessary constituent."

[22] On this point, see especially the profound observations of the eminent German publicist Jellinek, in his *Recht des modernen Staats* (2d ed., 1905), 325 ff., and his *Staatenverträge*, 37 ff.

[23] Creasy (*First Steps*, etc., p. 70) observes on this head: "Although Sovereign States acknowledge no common Superior Lawgiver from which they collectively receive imperative Law, yet they can and do make up a community capable of establishing Laws which shall be binding on each member of the community. In this sense the community at large is a sovereign Lawgiver to each member of the community." So far he seems sound, subject to the reservation that each member

Nor is International Law wholly without judicial sanction. It is frequently administered and interpreted by judicial tribunals, more particularly by courts of arbitration and national prize courts. The Hague Conference of 1907 even provided for the creation of an International Prize Court which, in the absence of conventions or national legislation, shall apply the rules of International Law.[25]

If physical sanction or the threat or guarantee of physical force is an essential characteristic of law, then it must indeed be admitted that International Law is a law of imperfect obligation. But it has been shown that such is by no means the case. It is impossible to agree with those authorities [26] who hold that war

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of the community can withhold its assent to these laws. But when he makes sanction for this law consist in war or physical force in prospective, we decline to follow him.

[24] This is not merely the author's opinion; it is that of eminent jurists like Jellinek, who says: "Such agreements (*Vereinbarungen*) are not in essence treaties. They create no *jus intra partes*, but a *jus supra partes*, *i.e.* they give expression to a common juristic conviction; they are not two-sided legal creations, but common irrevocable declarations" (*Öffentliches Recht*, 299).

[25] Title I, Art. 7, of the "Convention for the Establishment of an International Prize Court." It was further provided: "*If generally recognized rules do not exist, the Court shall decide in accordance with the general principles of justice and equity.*" The Court is thus expressly authorized to create International Law in such a contingency.

[26] For example, Bluntschli, Introduction, p. 8; Creasy, § 78; Holland, *Jurisprudence*, (10th ed.) 391–393; Salmond, *Jurisprudence*, 14; 1 Twiss, pp. vii–ix.

Among those who deny that war is a legal sanction, are: Amos, *Remedies for War*, 137; Bonfils (Fauchille),No. 29; Chauveau, note on p. 14; Chrétien, No. 7; Funck-Brentano et Sorel, 7; Nippold, *Die Fortbildung des Verfahrens*, 86; and 1 Pradier-Fodéré, No. 23. See also Dumas, *Sanctions de l'arbitrage* (1905), *passim;* Moulin, *La doctrine de Drago*, 121–129; Preuss, *Das Völkerrecht im Dienst des Wirtschaftlebens*, 17 ff. and note on p. 58; Lagorgette, *Le rôle de la guerre*, 318 ff.; and Lueder, in 4 Holtzendorff's *Handbuch*, § 49.

is the real or main sanction of the Law of Nations; for the attempt to characterize war as a guarantee of law or a means of justice in ordinary cases must be considered harmful as well as vain. Not that war is to be condemmed in all cases, but it is a final appeal only to be justified as a last resort after every other mode of obtaining justice or redress has failed.

10. **International Law as a Part of Municipal or State Law.** — That International Law is a part of the law of the land is no longer a matter of serious doubt, at least in England and the United States. That the Law of Nations, in its full extent, is a part of the law of England was the view of Blackstone (*Commentaries*, 1765, Bk. IV, ch. 5, p. 67) and of Lords Talbot and Mansfield in the eighteenth century (*Triquet* v. *Bath*, 1764, 3 Burr. 1478, and Scott, 6; and *Heathfield* v. *Chilton*, 1767, 4 Burr. 2015, and Scott, 189), as also of Lords Ellenborough and Stowell (*Wolf* v. *Oxholm*, 1817, K. B., M. and S. 92, and Scott, 496; *The Maria*, 1799, 1 Rob. 350, and Scott, 858; and the *Recovery*, 1807, 6 Rob. 348) in the early part of the nineteenth century.

This view appears to have prevailed in England[27] until apparently reversed by a bare majority of the Court of Crown Cases Reserved in the famous case of *Queen* v. *Keyn* (L. R., 2 Exchq. Div. 63, and Scott, 154) in 1876. This Court declined, in the absence of an Act of Parliament, to assert British criminal jurisdiction over the captain of the German steamer *Franconia* who had been convicted of manslaughter in the Central Criminal Court for having killed a passenger on board the British steamer *Strathclyde* (as the result of a collision due to negligence) within two and a half miles from the English coast, *i. e.* within the limits of the marine league. In spite of the fact that this decision was promptly nullified by Act of Parliament, and although there was a strong minority opinion supported by six of the thirteen judges, the authority of the older view was considerably shaken.[28] But all reasonable doubt in England as to the legal nature of International Law has now apparently been finally removed by the opinion of Lord Chief Justice Alverstone (formerly Sir Richard Webster) in the case of *West Rand Central Gold Mining Co.* v. *The King* (L. R. 1905, 2 K. B. 391). Although the petitioners (British mine owners in the Transvaal who sought to recover gold which had been seized by officials acting for the Transvaal Government) were refused redress on the ground that annexation was an act of State which could not be inquired into by the Court, Lord Alverstone assented to the proposition laid down by Lord Robert Cecil that "International Law is a part of the law of England." He said:

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[27] See, *e.g.* the leading case of the *Emperor of Austria* v. *Day and Kossuth* (1861), 2 Gifford, 623, 678.

[28] 42 Vict., c. 73. For discussions of the case of *Queen* v. *Keyn*, see 1 Cobbett, *Cases*, 132 ff.; Holland, *Studies*, 185; Maine, *Int. Law*, 38–45; 2 Stephens, *Criminal Law*, 29–42; Triepel, *Völkerrecht und Landesrecht*, 151 ff.; Walker, *Science*, 173 ff.; Westlake, in 22 *Law Quarterly*, 15–16; Willoughby, "The Legal Nature of Int. Law," in 2 *A. J.*, 360 ff.

"It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of International Law may be relevant."[29]

This doctrine laid down by Lord Alverstone has in its favor a long, unbroken series of decisions in the United States. As early as 1804 Chief Justice Marshall declared, in the case of *The Charming Betsey* (2 Cranch, 64, 118): "An act of Congress should never be construed to violate the Law of Nations if any other possible construction remains."[30] In the case of the *Nereide*

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[29] Lord Alverstone, however, added the following warning: "But any doctrine so invoked must be one really accepted as binding between nations, and the International Law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition has been recognized and acted upon by our own country, or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be a part of International Law by their frequent practical recognition in dealings between various nations." On the importance of this case, see Scott, "The Legal Nature of Int. Law," in 1 *A. J.* 855 ff.; Westlake, in 22 *Law Quarterly Review*, 14–26; and 6 *Columbia Law Review*, 49–50.

[30] But this must not be interpreted to mean that the courts would give effect to a custom of International Law in the face of a statute clearly commanding a violation of its principles. In such a case the State would be responsible to the Community of Nations. It should be added that the jurisdiction of the courts does not extend to questions of a purely political nature.

(1815, 9 Cranch, 383, 423) he declared International Law to be "a part of the law of the land." In the *Scotia* (1871, 14 Wall. 170, 187–188, and Scott, 17) Justice Strong said: "No single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the Laws of Nations, it rests upon the common consent of civilized countries. It is of force, not because it is prescribed by any superior power, but because it has been generally accepted as a rule of conduct." The most recent and authoritative case in the United States is that of the *Paquete Habana* v. *U.S.* (1899, 175 U.S. Rep. 677, and Scott, 19) in which our Supreme Court held (p. 686) that even in the absence of treaty, express proclamation, or municipal law, "by an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of International Law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

"International Law is a part of our law, and must be ascertained and admitted by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[31]

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[31] Justice Gray, in the *Paquete Habana*, *op. cit.*, p. 700, or Scott, 19. *Cf. Ibid.*, in *Hilton* v. *Guyot* (1894), 159 U. S. Rep. 113, 163.

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The student is especially recommended to read the following: Beale's *Cases*, Preface, and Summary at the close of the third volume; Minor, *Conflict of Laws*, Introductory chapter to the second edition of 1905, and ch. 1 on "Preliminary Principles"; and Preface to Wharton's *Conflict of Laws*.

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The first jurist who appears to have fully realized the importance of these phenomena was L. von Stein. See his *Handbuch der Verwaltungslehre* (3d ed.), I, 245 ff., 263 ff., and II, 828 ff. Among the few authorities on International Law who deal with this subject are: Liszt (3d ed.), §§ 16–17, 28–30, 33–36; 2 Mérignhac, 694–718; 1 Oppenheim, §§ 458–471, 578–591; Ullmann (2d ed.), §§ 68–69; Zorn, §§ 16–17.

The Austinian or Imperative View of Law. — Among those authorities who may be cited as virtually in favor of the Austinian or imperative view of law, or some slight modification thereof, are: 1 Acollas, *Cours élémentaire de droit*, Introduction, p. vii; * Austin (Campbell's ed.), Introductory and Lects. I, V, and VI of the *Province of Jurisprudence Determined*, and Lects. XXII and XXVII on "Sanctions"; Fricker, *Das Problem des Völkerrechts*, in 34 *Zeitschrift für Staatswissenschaft*, 368 ff.; Hobbes, *De Cive*, cap. 14, § 4; * Holland, *Jurisprudence* (10th ed.), 127–129, 380–383; * 1 Ihering, *Zweck im Recht* (1884, 2d ed.), 320 ff.; * Lasson, *Prinzip und Zukunft des Völkerrecht* (1871), 43 ff.; 2 Lorimer, *Institutes* (1884), 189; Leacock, *Elements of Political Science*, 100–104; Pollock, *First Book on Jurisprudence*, 96; Pomeroy, §§ 9–30; * 1 Puchta, *Gewohnheitsrecht*, 1421; Pufendorf, *De jure nat. et gentium*, lib. II, cap. 3, § 23; Salmond, *Jurisprudence*, §§ 16–17; * 2 Stephens, *History of Criminal Law*, 32 ff.; Stephens (J. K.), *Int. Law and International Relations* (1884), Pt. I; Wheaton, *History*, 95 f.; * Willoughby, *Nature of the State*, 199–204; * *Ibid.*, "The Legal Nature of International Law," in 2 *A. J.* (1908), 357–365; Wilson, *The State*, § 1457; Zorn, § 2.

As against the Austinian or imperative view, the following authorities may be cited: Amos, *The Science of Jurisprudence*, 394, 409–413; * Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1871), 12 ff.; Bernard, *Lectures on Diplomacy*, 171; Bluntschli, *Introduction*, 2–11; * Bonfils (Fauchille), Nos. 26–31; * Bryce, *Studies in History and Jurisprudence*, 499–502; Bulmerincq, in 1 Marquardsen, § 12; *Ibid.*, *Praxis und Theorie des Völkerrechts*, 158 ff.; Bry, § 2; Carter, in the *Report of the American Bar Association* (1890), 222 ff.; Chauveau, § 2; * Clark, *Practical Jurisprudence*, 5, 181–187; Creasy, 70–76; Despagnet, Nos. 38–40; 1 Fiore, Nos. 186 ff., and 30 *R. D. I.*, 5–25; Gareis, § 2; Hall (5th ed.), 13–16; * Harrison (Fr.) on "The English School of Jurisprudence," in 24 *Fortn. Rev.* (1878), 475–492, 682–703; 1 Halleck (Baker's 3d ed.), 51, 54; Heffter (Geffcken), § 2, especially note on pp. 3–5; Holtzendorff, in 1 *Handbuch*, §§ 6–7; Jenks, *Law in the Middle Ages*, ch. 1; * 1 Jellinek, *Das Recht des modernen Staates* (1905, 2d ed.), 328, 364–368; *Ibid.*, *Staatenverträge* (1888), 7–8, 37 ff.; *Ibid.*, *Öffentliches Recht* (1892), 195, 296–314; Kaltenborn, *Kritik des Völkerrechts* (1837), ch. 6; Kebedgy, in 29 *R. D. I.*, 113 ff.; Lawrence, *Essays*, 1–41; *Ibid.*, *Principles* (3d ed.), §§ 8–11; Leseur, 37 ff.; Liszt (3d ed.), § 1, pp. 6–8; 1 F. de Martens, §§ 1–2; Maine, *Int. Law*, Lect. II, 26–53; * *Ibid.*, *Early History of Institutions*, Lects. XII and XIII; 1 Mérignhac, 18–24; Mougins de Roquefort, *La solution juridique des conflits internationaux* (1889), 36 ff.; 1 Nys, *Le droit int.*, 133–143, and *Les origines*, Introduction; 1 Oppenheim, §§ 2–10; 1 Phillimore, Introduction, ch. 1; 1 Piédelièvre, 5–11; * Pollock, "Sources of International Law," in 2 *Columbia Law Rev.*, 514 ff.; 1 Pradier-Fodéré, Nos. 7–12; Rattigan, *Jurisprudence*, 12–20, 355–357; Renault, *Introduction*, 6 ff.; Rivier, 18–24; Russell (Lord), in 19 *Rep. Am. Bar Assoc.* (1896), 255 ff.; Salmond, *Jurisprudence*, 95-106, 628–639; Savigny, *System*, § 11; * Scott, on the "Legal Nature of International Law," in 1 *A. J.* (1907), 83–166; Triepel, *Völkerrecht und Landesrecht* (1899), 103 ff.; 1 Twiss, §§ 104–105; * Ullmann, § 4; Walker, *History*, ch. 1, 2–3; *Ibid.*, *Science*, chs. 1 and 2, 1–56; 1 Westlake, 5–9; *Ibid.*, *Chapters*, 11–15; Woolsey, §§ 26–29.

Several of the authorities cited above are difficult to place. Thus Savigny speaks of International Law as at once positive and imperfect. The position of Ihering is also somewhat difficult to determine. Like Savigny he is cited on both sides of the question. He (Ihering) insists upon force as an essential element in law; but he also declares (p. 325) that the legal nature of the Law of Nations is not a subject of doubt.

On p. 13 of his *First Book on Jurisprudence* (1896), Pollock speaks of International Law as consisting of "these customs and observances in an imperfectly organized society which have not fully acquired the character of law, but are on the way to become law;" and on p. 96 he appears to deny that the "duties of independent States to one another" are "legal duties or the subject of legal rules." In an earlier work (*Essays in Jurisprudence and Ethics*, published in 1882, p. 35), he speaks of the "extreme purists of the analytical school, who deny that it (Int. Law) is really law." He asks (on p. 37), "should we not, then, regard public opinion as the final sanction of International Law in every case, — a sanction with physical force behind it, no doubt, in one or another shape, but with a force latent and undefined, and to be called into action only in an extreme case?" I have therefore cited him on both sides of this question.

Salmond (*Jurisprudence*, p. 11) defines law as "the rules recognized and acted on in courts of justice." Although he maintains that the imperative theory of law is defective in that it only contains the most important element of the truth, yet he must be classed as essentially Austinian, inasmuch as he holds that "law is based on physical force."

It may be noted that Westlake, who formerly denied the positive character of International Law (see *Treatise on Int. Private Law*, 2d ed., 1880, pp. 3 ff.) is strongly anti-Austinian in his later works.

For references showing a tendency toward a reversion to the Austinian or imperative view of law, due to imperial legislation in modern Germany, see * Pound on "The Scope and Purpose of Sociological Jurisprudence," in 24 and 25 *Harvard Law Review* (1911 and 1912), 593 and 144–145 respectively.

CHAPTER II

THE BASIS OR SOURCES OF INTERNATIONAL LAW

11. **The Basis or Foundation of International Law.** — Like the State itself, International Law is ultimately based upon the innate or inherited sociability of human nature directed by specific human needs and interests. Though a fighting animal almost constantly engaged in a desperate struggle for existence with his environment and frequently at war with his fellows, man is also a social and political being who has long since discovered that mutual coöperation and organization are at least as essential to human well-being and progress as are struggle, rivalry, and competition.[1]

Ever since his earliest appearance on this planet, men have apparently lived not in isolation, but in more or less hostile or friendly groups which form ever widening circles (families, hordes, clans, cities, nations, states, confederacies, etc.) within which the practice of mutual aid or coöperation, due to a sense of interdependence, has largely supplanted, or at least greatly modified, the habit of struggle and competition. This habit or practice of mutual aid and coöperation was gradually extended to intergroupal relations, until it now includes all civilized states, races, and nations, and appears to be entering upon its final phase of world organization.[2]

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[1] For illustrations of the operation of this principle even among lower animals and savages, see the first three chapters of Kropotkin's remarkable book entitled *Mutual Aid, a Factor of Evolution* (1902). Cf. Romanes, *Animal Intelligence, passim;* Espinas, *Sociétés animales* (1877); Moran, *Animal Behavior*, ch. 5; Topinard, *Science and Faith* (1899), ch. 4.

On the general principle, see Giddings, *Principles of Sociology*, Bk. II, ch. 1, and Bk. III, chs. 1, 2, and 3, *passim;* Durkheim, *De la division du travail social*, liv. I, ch. 1, 28 ff., chs. 5 and 6; Novicow, *La critique du darwinism social*, ch. 8; Pulszky, *Theory of Law and Civil Society*, ch. 6; and Ross, *Social Control*, chs. 1, 7, 10–11. See Tarde, *Les lois de l'imitation*, ch. 3, for a criticism of this view, which he perhaps rightly holds to be insufficient. Conscious and unconscious imitation resulting in fixed habits undoubtedly play an important rôle in the development of the social order.

12. **The Society or Community of States.** — In international relations this solidarity of interests, based on a human need for coöperation and organization, has stimulated the growth of customs and led to the formation of rules and agreements for the maintenance of durable community interests and peaceful intercourse even in time of war. It has given rise in modern times to the conception of a Community, Society, or Family of States,[3] the members of which retain their sovereignty and independence and are regarded as possessed of equal rights and duties in the eyes of International Law; but who have also developed a strong

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[2] On *World Organization*, see Bridgman, *World Organization* (1905); Duplessix, *L'organization int.* (1909); Hill, *World Organization*, etc. (1911); Novicow, *La Fédération de l'Europe* (1901); Schücking, *Die Organization der Welt* (1909); Von Stengel, *Weltstaat* (1909); and Trueblood, *The Federation of the World* (1899).

Among those authorities who find the basis or foundation of International Law in the principle of human sociability or solidarity of interests in one form or another, may be cited: Bluntschli, 1; Bonfils (Fauchille), Nos. 5 ff.; Bry, No. 1; Chauveau, No. 1; Chrétien, No. 1; Despagnet, Nos. 2–3, 38; 1 Fiore, Nos. 151 ff.; Geffcken, *Die Interessenlehre als Grundlage des Staates und Völkerrecht* (1898); Grotius (Whewell's trans.), Prolegomena, §§ 7–8, 16–18, 22, 23; Hefter (Geffcken), § 2; Holtzendorff, *Elements*, § 1, and 1 *Handbuch*, 44 ff.; Hautefeuille, *Droit maritime*, ch. I; Kaltenborn, *Kritik*, 298; Liszt, § 1; 1 F. de Martens, § 1, p. 1 and 45–52; 1 Mérignhac, 2, 18; Nippold, *Die Fortbildung des Verfahrens* (1907), 35 ff.; 1 Nys, *Le droit int.*, 65–66; 1 Ortolan, *Dip. de la mer*, ch. 1, p. 2; 1 Phillimore, § VII; 1 Piédelièvre, 1, 13–14; Pillet, in *R.G.D.I.* (1894), 1 ff.; Pradier-Fodéré, No. 21, p. 72; Preuss, *Das Völkerrecht im Dienste des Wirtschaftslebens* (1891); Suarez, *Tractatus de legibus* (1612), II, ch. 11, No. 9, quoted by Nys, *Les origines*, 11–12; Ullmann, § 1; Westlake, *Chapters*, 26–27; Vattel, §§ 10–12.

Several of the authorities (*e.g.* 1 Rivier, *Principes*, p. 7) make the common legal consciousness of the society of nations, based on reason, the primary source of International Law. But in the light of modern psychology, a purely rationalistic basis for International Law may well be doubted. The preamble to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes recognizes "the solidarity which unites the members of the society of civilized nations."

[3] Westlake (*Int. Law*, I, p. 1) defines International Law as "the law of the society of States or nations." Oppenheim (I, § 12) uses the term "family of nations." The majority of the publicists who make use of the conception referred to above seem to prefer the term "international community" or "community of States or nations." On the "Law of the International Community," see especially, 1 F. de Martens, §§ 39, 45–52. In German the term *Staatenverein* is employed. On the nature, rise, and growth of the "Society of Nations," see especially Lawrence, *International Problems*, chs. 1–3.

The Spanish theologians of the sixteenth century seem to have been the first publicists to give expression to this conception, but it was first given a wide currency by Grotius.

sense of interdependence or internationalism. This International Community is by no means a World State or *civitas maxima* based on abstract principles of justice and equity. It is rather a "free society of peoples united by the solidarity of their tendencies and interests."[4]

13. **Utility as the Purpose of International Relations.** — The guiding motive or purpose of international relations should be utility or the satisfaction of collective needs and interests, whether intellectual, moral, or material. These become ever greater, more varied and imperative as the mutual interdependence and solidarity of nations constantly increases. They have, indeed, become so great and complex that it has been found necessary to give certain rules and customs of international intercourse the solemn character of International or World Agreements and thus render them more imperative. There has even been an attempt to create some suitable machinery for their better observance and enforcement. In the further development of International Law, motives of utiltity and a sense of international community interests should be allowed to have at least as much influence as tradition and precedents based upon metaphysical conceptions of natural law or abstract principles of justice. Jurists must learn to look forward as well as backward, and should have regard to the probable or possible social consequences of a given practice rather than to mere conformity with past usages and ideals. Social utility, or adaptability to human needs and social conditions, is thus the ultimate test of international, as of all human law. The better to answer these needs and interests, the Law of Nations tends, like every other branch of jurisprudence, to become more pragmatic and sociological.[5]

14. **The Primary Sources of International Law.** — The primary sources of positive International Law are: (1) custom

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[4] Cf. Bonfils (Fauchille), No. 13; and 1 F. de Martens, 268. "To move and live and have its being in the great community of nations is as much the normal condition of a single nation, as to live in a social state is the normal condition of a single man." 1 Phillimore, § VII.

[5] On *Utility* as a test of International Law, see Creasy, ch. 3, especially the citation from Story (*Conflict of Laws*, § 35) on p. 62. The doctrine is derived from Bentham. See especially Bentham's *Works* (Bowring's ed.), Pt. VIII, p. 538.

For a remarkable series of articles on "Sociological Jurisprudence," see Pound, in 24 and 25 *Harvard Law Rev.* (1911 and 1912). They will soon appear in book form.

based on tacit consent and imitation; and (2) convention or express agreement by means of treaties.[6]

Customary International Law has grown by means of tacit agreement and imitation or consent. It is the Common Law of Nations which has developed gradually from usage or precedents set by particular States as the result of acquiescence or imitation on the part of the other members of the international community. It has as its guarantee or sanction the consensus of opinion and usage of the civilized world, and it forms the oldest and intrinsically the most important portion of International Law; for it is deeply rooted in the habits, sentiments, and interests of mankind.

In dealing with treaties as a source of International Law, it is necessary to distinguish between treaties which are mere bargains or contracts between States, or those which contain no rules for the regulation of international conduct, and treaties which are declaratory or stipulatory of International Law. Especially important are the great International or World Agreements which preserve the form of treaties (reserving to each State the right of sanction or ratification), but which are really great acts of international legislation and which create or codify existing international practice. Such are, *e.g.* the Declaration of Paris of 1856, the Geneva Conventions of 1864 and 1906, and the sixteen Conventions of the Hague Conferences of 1899 and 1907.[7]

15. **The Evidences of International Law.** — The evidences or witnesses of International Law are the places where the law

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[6] Westlake (I, pp. 14–15) makes "custom and reason" the two sources of International Law. But he thus confuses one of its sources with a means of interpretation. As Oppenheim (I, note on p. 22) justly remarks: "Reason is a means of interpreting law, but it cannot call law into existence." Writers frequently confuse the *sources* of International Law with its *basis* or *foundation* on the one hand, and the *evidences* or *witnesses* to its existence on the other. Some Continental publicists (*e.g.* Gareis, § 9, and Leseur, pp. 22 f.) find a source of International Law in the *necessitas* of the Roman jurists. For a criticism of this view, see Ullmann (2d ed.), p. 40.

[7] As pointed out by Jellinek (*Öffentliches Recht*, pp. 193 ff. *Cf. Staatenverbindungen*, 107 ff.), such agreements (*Vereinbarungen*) are the results of the collaboration of many individual wills working for the satisfaction of *common* interests, whereas ordinary treaties (*Verträge*) are the product of several wills working for particular and often opposing interests. See also Binding, *Das Gründung des norddeutschen Bundes* (1889); 1 Nys, *Le droit int.*, p. 157; and Triepel, *Völkerrecht, passim.*

For a list of lawmaking treaties, see 1 Oppenheim, §§ 558–568; and Introduction to Whittuck, *International Documents.*

as applied or agreed upon is found,[8] or the documents which bear evidence or witness to existing principles and customs. Arranged in the order of their *extrinsic* importance from the standpoint of formal authoritativeness, they are as follows:

(1) International or World treaties which virtually legislate or codify existing practice. These are the works of International Congresses or Conferences which are composed of delegates vested with full powers to negotiate and conclude treaties of the character indicated above.

(2) The Agreements of International Congresses and Conferences whose work has not received official sanction or ratification. Examples are the Brussels Conferences of 1874 and the Geneva Convention of 1868. The work of such Conferences has sometimes been of great importance, inasmuch as they have codified or influenced existing practice.

(3) Treaties, whether between several or a considerable number of States, which merely purport to be declaratory of existing law or stipulatory of new principles or usages. Such are, *e.g.* the Armed Neutralities of 1780 and 1800, the Three Rules of the Treaty of Washington of 1871, and Franklin's famous treaty of 1785 between the United States and Prussia which stipulated for the exemption of private enemy property from capture at sea.

(4) The decisions of judicial tribunals, more especially of Courts of Arbitration, International Commissions of Inquiry, and Prize Courts. The decisions of the Geneva Board of Arbitration which settled the Alabama claims in 1872, the North Sea International Commission of Inquiry of 1906 which investigated the North Sea Incident,[9] and the decisions of the Hague Tribunal created in 1899, will undoubtedly be treated as important precedents in similar cases in the future. If the International Prize Court and the Court of Arbitral Justice provided for by the Hague Conference of 1907 ever come into existence, their decisions will, of course, take first rank in this category.

Prize Courts, though hitherto national in character, are supposed to administer International Law; and the decisions of judges of international reputation for learning and impartiality, like Sir William Scott (later Lord Stowell) and Justice Story, have always been treated with great respect, especially in England and the United States. Such decisions have more value for the student of positive International Law than the mere opinions of any publicist, however eminent, partly because they bear a certain stamp of judicial authentication, but still more because the cases have presumably been argued by able counsel and carefully considered from every standpoint, more particularly with a view to their practical bearings.

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[8] This is the sense in which the term "sources" is generally used by historians, but jurists use the term in a different sense. The phrase "evidences of International Law" is borrowed from Walker, *Science*, ch. 2.

[9] See Hershey, *International Law and Diplomacy of the Russo-Japanese War*, ch. 8; and *infra*, § 308, note on pp. 326–327.

On the other hand, excessive deference is sometimes paid in England and the United States to judicial opinions which are mere *obiter dicta*, and judicial decisions are often given a more extended application than they deserve. In dealing with judicial decisions, the student should always remember that they are necessarily of limited application, both as to subject-matter and in respect to nationality, and that International Law is based upon general usage or international practice. This implies a much wider field of study and research than is afforded by any supply of judicial decisions, however copious. This condition of our science is one of the gravest objections to the teaching of International Law by the main or exclusive use of the "case system."[10]

(5) Unilateral Acts or Laws, Ordinances, Proclamations, Decrees, Declarations or Instructions issued by a State to its naval, military, diplomatic, or consular representatives for the capture and disposition of prizes, the conduct of its armies and navies, or the transaction of its business abroad. Famous examples of this sort are the French Marine Ordinance of 1681; the British Admiralty Manuals and the American Naval War Code of 1900 (withdrawn in 1904); the Instructions for the Government of the Armies of the United States in the Field, issued during our Civil War; the United States Neutrality Laws

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[10] "The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the Law of Nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." Chief Justice Marshall, in *Thirty Hogsheads of Sugar* v. *Boyle* (1815), 9 Cranch, 191, 198.

of 1794 and 1818 and the British Foreign Enlistment Acts of 1819 and 1870; and the various Declarations of Neutrality issued at the outbreak of important wars.

(6) Opinions of statesmen as expressed in important state papers and diplomatic correspondence, and opinions of legal advisors of the various Governments, such as those of the law officers of the Crown in Great Britian and of the Attorneys-General of the United States. Such opinions are important in that they bear a certain official stamp and are usually well considered and practical; but they are apt to be biased by advocacy of a particular cause. Moore's monumental *International Law Digest* (in eight volumes, 1906) illustrates the wealth of material of this sort existing in the foreign archives of a single modern Government.

(7) The writings of eminent jurists and authorities on International Law. "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on International Law."[11]

"Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles."[12]

The above passages from Kent and Wheaton were approvingly cited by Justice Gray in his opinion in the case of the *Paquete Habana*. He added: "Such works [the works of jurists and commentators] are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[13] Especially valuable is the work of learned societies like the Institute of International Law.

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[11] 1 Kent, *Com.*, 19.

[12] Wheaton, § 15.

(8) The histories of International Relations, more particularly of wars, negotiations, and treaties. Such histories, though they should be used with the greatest caution, contain almost exhaustless stores of information bearing upon the development of the theory and practice of the Law of Nations. Especially important are the histories of diplomacy and International Law, like those of Hill, Laurent, Walker, and Wheaton.[14]

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[13] The *Paquete Habana* (1899), 175 U. S. 677, 700. *Cf. Hilton* v. *Guyot* (1894), 159 U. S. 113, 163–164, 214–215; Lord Coleridge, in *Queen* v. *Keyn* (1876), L. R., 2 Excheq. Div. 63, 154; and Lord Alverstone, in *West Rand Central Gold Mining Co.* v. *The King* (1905), 2 K. B. 391, 401–402, 407.

As in the case of certain great International Treaties, some of the earlier publicists like Grotius, Bynkershoek, and Vattel should perhaps be listed as primary as well as secondary sources or evidences of International Law. They not only interpreted and systematized existing international custom; but, like the Roman imperial jurists, they virtually exercised legislative functions, and many of their mere opinions were long regarded as authoritative. In the case of modern writers, a consensus of opinion, or evidence amounting to proof, is necessary before a given rule or custom can be accepted as unquestionable law. It should also be noted that publicists seem to enjoy a greater authority on the Continent than in England and the United States, and their authority seems somewhat greater in the United States than in England.

[14] See List of Authorities, *infra*. Some authorities lay stress upon the importance of Roman Law as a source of International Law. See, *e.g.* Creasy, 83–86; Halleck (Baker's 3d ed.), 57 f.; Maine, *Ancient Law* (Pollock's ed.), 92 ff. (*cf. Int. Law*, 20 ff.) and notes in Appendix, 396 ff.; 1 Phillimore, §§ xxxviii–xl. But whatever value it may have originally possessed as the source from which Grotius and others drew many of their rules, the *Corpus Juris Civilis* cannot, as Calvo (I, § 38) justly observes, "be applied to the international relations of modern peoples without the gravest inconveniences," except in the domain of International Private Law. Halleck (I, ch. 2, § 18 of Baker's 3d ed.), Phillimore (I, § xxiii), and Pomeroy (§ 32) still speak of the Divine Law or principle of justice as a source of International Law; and a few publicists (like Hautefeuille, Discours preliminaire to *Droit des neutres* and *Droit maritime*, ch. 1) constantly refer to an imaginary "primitive law" (*droit ou loi primitive*). For an able criticism of Hautefeuille on this point, see Historicus, 75 ff.

54–66; 1 Fiore, liv. II, ch. 5; Hall (6th ed.), 5–13; Gareis, § 9; 1 Halleck (Baker's 3d ed.), 55–64; Heffter (Geffcken), § 3; Hautefeuille, *Droit maritime*, ch. 1; Holtzendorff, *Eléments*, 14; * *Ibid.*, in 1 *Handbuch*, §§ 21–39; Jellinek, *Die rechtliche Natur des Staatenverträge* (1880); Kaufman, *Rechtskraft des int. Rechts* (1899), 2 ff.; * Lawrence, *Principles* (3d ed.), §§ 61–66; Liszt, § 2; 1 Lorimer, *Institutes of the Law of Nations;* Maine, *Int. Law*, Lect. I; 1 Martens, § 43; * 1 Mérignhac, 79 ff.; Nippold, *Die Fortbildung des Verfahrens*, 19 ff.; 1 Nys, *Le droit int.*, 144–165; * 1 Oppenheim, §§ 15–19; Perels, § 2; 1 Phillimore, Pt. I, chs. 3–8; 1 Piédelièvre, No. 4; * Pollock, on "Sources of Int. Law," in 2 Columbia Law Review (1902), 511–524; Pomeroy, §§ 31–46; 1 Pradier-Fodéré, Nos. 24–35; 1 Rivier, *Principes*, § 2; Snow, § 3; Taylor, §§ 30–95, 115; Triepel, *Völkerrecht und Landesrecht* (1889), § 3; 1 Twiss, ch. 6; Ullmann (2d ed.), § 8; * Walker, *History*, ch. 2; 1 Westlake, *Int. Law*, ch. 2; * Wheaton, § 15 and notes of his various commentators; Wilson, 4; Woolsey, §§ 28, 30; Zorn, § 3.

CHAPTER III

THE HISTORY OF INTERNATIONAL RELATIONS DURING ANTIQUITY AND THE MIDDLE AGES

16. **International Law impossible before the Rise of the Modern European State System.** — The history of International Law is essentially a history of the law governing the members of the International Community of States in their relations with one another. Inasmuch as the observance of well-established customs of the Law of Nations implies the existence of an International Community of States based upon a general recognition of the fundamental principles of territorial sovereignty and legal equality of independent States, such a law (in the strict and full sense of this term) could not possibly have been developed prior to the rise of the modern European State System, at the close of the Middle Ages or during the fifteenth and sixteenth centuries of our era. Nevertheless, we are by no means without evidence, even during Antiquity and the Middle Ages, of the observance in intercommunity intercourse of certain rules and customs, mainly with a religious sanction. This was especially the case in Greece, where there were developed rules and customs of *intermunicipal* law which, in many respects, bear a truly remarkable resemblance to our modern system of international jurisprudence.

17. **The International Relations of Antiquity.** — The international relations of the Ancient World have been represented by historians as almost wholly based upon force, and the nations of antiquity are usually described as living in a state either of almost complete isolation or of perpetual warfare with one another. But recent studies and researches, based largely upon archæological discoveries, have demonstrated that such was by no means invariably the case; and that the older conception of the interstate and intertribal life of antiquity, as either non-existent or as characterized by a ceaseless and remorseless struggle, needs consider-

able modification. This is even the case with very primitive and backward races.[1]

True it is that the interstate relations of Antiquity, as also of the Middle Ages, were largely controlled by force. An appeal to arms, the divine right of the stronger, constituted the normal mode of settling disputes and securing concessions or advantages. War was regarded as the natural condition of mankind; peace, as an artificial state secured by treaty or convention. Diplomacy, in the sense of statecraft, was by no means unknown; but it was Machiavellian in character, and was usually employed as an aid to war, or a substitute therefor, rather than as a means of preserving peace. The foreigner, at least technically, was usually regarded as an enemy, *i.e.* as a creature without legal rights or obligations.

18. **The Patriarchal System.** — Under the patriarchal system, which has played such an important rôle in the social and political development of our race,[2] the father and the elders represented the family and the *gentes*, or clans, in their relations with other family or gentile groups. Political power, at least in its earlier stages, resulted mainly from the application of the principle of confederation; and as the families and *gentes* formed themselves into *phratries* (or *curiae*) and tribes, and finally developed into the city or confederated *gentes* or tribes, this power and responsibility was conferred upon the representative or representatives of the whole association of associated groups,[3] each group remain-

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[1] See especially Kropotkin, *Mutual Aid*, etc., ch. 3, on "Savages"; and an interesting study of the relations between Australian groups by Wheeler, in 40 *R. D. I.* (1908), 5–30. See also Letourneau, *La guerre dans les diverses races humains* (1895), chs. 2–8.

Maine (*Int. Law*, p. 11) justly observes: "Man has never been so ferocious or so stupid as to submit to such an evil as war without some effort to prevent it." Montesquieu seems to have had some perception of this truth when he said: "All countries have a Law of Nations, not excepting the Iroquois themselves, though they devour their prisoners; for they send and receive ambassadors, and understand the rights of war and peace. The mischief is, that their law of nations is not founded on true principles." *Esprit des lois*, Bk. I, ch. 3.

[2] This is at least true of the Aryan and some of the Semitic peoples. It is not implied in the text that the patriarchal system was the primitive form of social and political organization. It was, relatively speaking, a late and highly developed form of political life. Nor is it implied that the family preceded the clan historically.

[3] Amongst the Iroquois, "the council of the tribe had power to declare war and make peace, to send and receive embassies, and to make alliances. Intercourse

ing more or less of an independent unit within its own sphere. Each group was bound together by the ties of a real or fictitious kinship,[4] and by common religious observances and beliefs. They naturally regarded all outsiders as foreign or hostile, *i.e.* as having no share in the common worship, and therefore no rights other than those granted by treaty [5] or accorded by religious duties of hospitality.

Such being the general course of early social and political development, we are not surprised to learn that a given tribe, village community, or city possessed little sense of intertribal or community obligations. Although the practice of mutual aid and coöperation had long since greatly modified the struggle for existence and power within the group (which indeed was often socialized to a remarkable extent),[6] the struggle between groups continued — a struggle in which the operation of the law of natural selection, resulting in the so-called survival of the fittest, was only slightly modified by a sense of religious obligation, and by certain rudimentary social interests and feelings.

19. **The Law of the Ancient World.** — "Woe to the conquered" [7] — the right of the stronger to the persons and possessions of the vanquished — was the doom pronounced by the ancient world upon nearly all conquered races and peoples. Any mitigation of the rights of the conqueror was, generally speaking, due to considerations of policy and enlightened self-interest, rather than to a sentiment of pity or a recognition of human rights.

Yet, as intimated above, the history of the international relations of Antiquity is by no means one of unrestrained conquest and slaughter, as too often represented by the older historians. The ancient Egyptians, the Babylonians or Chaldeans, the East

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between independent tribes was conducted by delegations of wise-men and chiefs." Morgan, *Ancient Society* (1877), 118.

[4] Fictitious kinship was created by the ceremony of adoption by means of which the newcomer renounced the worship of his former household gods and was initiated into the worship of those by whom he had been adopted. The ancient custom of adoption might be compared with the modern practice of naturalization. See especially Coulanges, *The Ancient City;* and Fowler, *The City State of the Greeks and Romans*, *passim.*

[5] This obligation was also a religious one, being sanctioned by an oath.

[6] This is illustrated by the communism of primitive groups which still survives in the *mirs* or village communities of Russia.

[7] A proverbial saying which Plutarch puts into the mouth of Brennus, the Gallic chieftain. See his *Lives*, "Camillus."

Indians, and the Chinese[8] were in the main peaceful, agricultural, and industrial peoples, averse to bloodshed and conquest except when driven thereto by great warriors or conquerors. The Assyrians, the Hebrews, the Phœnicians and Carthaginians, and the Greeks and Romans appear, on the other hand, to have been more warlike and bloodthirsty.

20. **India.** — In India the Brâhmans formulated maxims of diplomacy which read like citations from Machiavelli's *Prince;*[9] but, unlike the precepts of the great Italian of the Renaissance, they recommend moderation, and even liberality, to the vanquished. The rules of warfare, laid down in the Code of Manu, seem to have been inspired by a genuine regard for the rights of humanity. Humane and even chivalric treatment of combatants as well as of non-combatants is recommended. Although the king is advised to ravage the enemy's territory, "and ever spoil his fodder, food, water, and fuel," to "burst tanks, enclosures, and trenches," to "assail him and terrify him by night";[10] yet "one should not, fighting in battle, slay enemies by concealed weapons, nor with barbed or poisoned (weapons), nor with fire-kindled arrows. Nor should one (mounted) slay an enemy down

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[8] On "International Law and Diplomacy in Ancient China," see Martin, *The Lore of Cathay*, cc. 22 and 23; and Mueller, in 3 *Zeitschrift für Völkerrecht und Bundesrecht* (1908), 192–205.

[9] *E.g.* "He (the king) should also appoint an ambassador learned in all the treatises, who understands gestures, expression, and acts (which are) pure, clever, well-descended. . . . For verily the ambassador alone unites, (and) divides also the united; the ambassador conducts that business by which they are divided or not. In affairs he (the ambassador) should know by (his) obscure signs and acts the emotions, intentions, and efforts of him (the other king), and (should learn) what he intends to do from (his) dependents. . . .

"A king should know the next (king to him to be) an enemy, as also the adherents of (that) enemy; the (one) next to the enemy (to be) a friend; the one beyond both (to be) neutral. All those he should gain by conciliation and the like means, separate or together; also by valor and policy. . . . Whenever (a king) infers a sure increase (of power) of himself in the future, and at the present time (suffers) little annoyance, then let him have recourse to an alliance.

"He (the king) should endeavor to overcome (his) enemy by alliances, bribery, and treachery — all together or separate — never by battle. . . . But in case the three expedients already mentioned do not suit, let (him), prepared, fight, so that he may conquer his enemies. . . ."

See *The Ordinances of Manu*, translated by Burnell and Hopkins, Lect. VII, Nos. 63–68, 155, 158–164, 169, 177, 180, 198, 200–210, etc. The date of this remarkable compilation is uncertain. It is generally set down as about 500 B.C.

[10] *Ibid.*, Lect. VII, Nos. 195 and 196.

on the ground, a eunuch, a suppliant one with loosened hair, one seated, one who says ‘ I am thy (prisoner) ’; nor one asleep, one without armor, one naked, one without weapons, one not fighting, a looker-on, one engaged with another; nor one who has his arm broken, a distressed man, one badly hit, one afraid, one who has fled: remembering virtue (one should not slay them).”[11]

21. **Egypt.** — The most remarkable contribution to our knowledge of the international relations of the ancient Orient resulted from the discovery at Tell-el-Amarna, in 1888, of nearly 300 tablets in cuneiform or Babylonian writing. These formed a portion of the foreign archives of the Egyptian Pharaoh Ikhnâton, and contained some of the diplomatic correspondence of that monarch and his immediate predecessor (Amenhotep III) with Asiatic kings, together with reports of Egyptian governors in Syria. This correspondence[12] throws a great deal of light, not only upon the international relations of the early part of the fourteenth century B.C., but also upon the organization of the Egyptian Empire by Thutmos III, and the remarkable Semitic civilization of Syria several centuries prior to the Exodus of the Hebrews. It shows that the yoke of Egypt was much lighter than that of Assyria, Carthage, or even Rome.[13] Besides, this correspondence shows that far from being isolated, as formerly believed, these famous empires of antiquity were in fairly close and constant commercial and intellectual intercourse, and that their Governments cultivated peaceful and friendly relations with one another. With the kings of Mitani, Assyria, and Babylonia, and even with the Hittites, friendly relations were maintained by means of a

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[11] *The Ordinances of Manu*, translated by Burnell and Hopkins, Lect. VII, Nos. 90–93. The Greek writers bear witness to the humane conduct of the East Indians in warfare. According to Megasthenes, they never destroyed the fields of the husbandman nor cut down his trees. Arrian adds that the peasants fearlessly followed the plow and gathered in their fruits and harvests in the midst of battle and warfare. For the passages of the Greek writers bearing on this subject, see Arrian, *Ind.*, c. II; Diodor. II, 36, 40; and Strabo, XV, 484, ed. Cassaub.

[12] For summaries of the contents of the *Tell-el-Armana Tablets*, see 2 Petrie, *History of Egypt*, 187–241; and Conder, *The Tell-Armana Tablets* (1893). For English translations of many of the tablets, see *Records of the Past* (new series), *passim*, and Condor.

[13] On the *Organization of the Egyptian Empire*, see Maspero, *Struggle of the Nations*, pp. 271–280; and Paton, *Early History of Palestine and Syria*, ch. 6, 82 ff. On the *Civilization of Syria*, see especially Sayce, in 88 *Contemp. Rev.* (1905), 264–277.

frequent exchange of letters, presents, and embassies; and even marriage alliances were not unknown.[14]

The oldest treaty of which the text has come down to us is that between Ramses II (the Sesostris of Greek legend and the "Pharaoh who knew not Joseph" of Hebrew tradition) and Khetasar, the King of the Kheta or Hittites (about 1272 B.C.). It is a very remarkable document, providing as it does not only for a defensive alliance, with a recognition of perfect equality and reciprocity between the two sovereigns, but for the mutual extradition of political refugees and immigrants, a codicil even providing for humane treatment of the latter. It is pleasing to learn that this treaty, which established a stable balance of power in Syria and was cemented by a marriage alliance, was loyally observed by both parties, at least during the reign of Ramses II.[15]

But in spite of the essentially mild and peaceful character of the ancient Egyptians, the monuments of Egypt bear witness to their cruelty in warfare and barbarous treatment of prisoners, whose heads or hands were often cut off and bodies mutilated[16] in the most frightful fashion, apparently for the purpose of registration. The Pharaoh himself sometimes presided at these bloody ceremonies, and even conquered princes were subject to the most humiliating treatment. The chariot of the conqueror was ornamented with the heads of the slain; and enslaved captives were chained and set to work, under the whips of hard taskmasters, at the public quarries, brickkilns, or dockyards.[17] The lives of women and children were usually, though not always, spared.

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[14] With the Mitani, a treaty of friendship cemented by marriage had been made at least as early as the reign of Thutmos IV (about 1420–1411 B.C.). The reigning Pharaoh also obtained several daughters of the king of Babylonia in marriage, but we learn that a similar request on the part of the latter was peremptorily refused. Whereupon the king of Babylonia suggested that any beautiful Egyptian maiden would do, for who would be able to say, "She is not a king's daughter."

[15] On this treaty, see especially Breasted, *History of Egypt*, 437–438; Maspero, *The Struggle*, etc., 401 ff.; 5 Budge, *History of Egypt*, 48 ff.; and 3 Petrie, *History of Egypt*, 64 ff. For English translations, see 4 *Records of the Past* (first series), 25–32; 3 Breasted, *Ancient Records of Egypt*, §§ 370–391; and 2 Brugsch, *Egypt under the Pharaohs*, 171–176.

[16] On the *Mutilation of Prisoners*, see Maspero, *The Struggle of the Nations*, 228 and note (*cf. Ibid.*, *Life in Ancient Egypt and Assyria*, 180). See especially the Great Karnak Inscription of Merneptah, trans. by Breasted, in 3 *Ancient Records of Egypt*, § 588.

[17] "Therefore, they did set over them taskmasters to afflict them with burdens. . . . And they made their lives bitter with hard bondage, in mortar and in

22. **The Hebrews.** — The Hebrews, themselves the victims of Egyptian oppression, appear to have been more cruel and barbarous than their taskmasters. Acting, as they supposed, under the express orders of Jehovah, they waged a relentless war of extermination against the natives of Palestine, with whom they were forbidden to intermarry or make covenants.[18] The adult males were almost invariably slaughtered, and even women and children were frequently massacred. The book of Joshua is filled with accounts of such barbarities. Similar atrocities were also enacted by Saul and David.[19]

But the Mosaic code, so enlightened in many respects, contains the germs of a higher law of warfare than that enjoined and practiced in Palestine. The laws of Deuteronomy provide that, before attacking a city, an offer of peace shall be made. If the offer is accepted, the inhabitants shall be made tributary. But in case of resistance all males shall be put to the sword. The women, children, and cattle may be spared if the cities are very distant; in the case, however, of the " cities of which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth; but thou shalt utterly destroy them." A limit is also set to the right of devastation. Fruit-bearing trees are not to be destroyed, even for use in a siege; for " the tree of the field is man's life." [20]

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brick and in all manner of service in the field." Exod. i, 11, 14. These captives seem to have been well fed, for the Israelites at times longed for the "flesh pots" of Egypt.

[18] Exod. xxxiv, 10–16, and Deut. vii, 1–3, 22–26.

[19] It is recorded that on one occasion Saul was commanded by the Lord, through Samuel, to "go and smite Amalek, and utterly destroy all that they have and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass." Saul "utterly destroyed all the people with the edge of the sword," but "spared Agag and the best of the cattle." Whereupon Samuel was angry, and "the Lord repented that he had made Saul king over Israel." 1 Samuel xv. For horrible acts of torture on the part of David, see 2 Samuel viii, 2, and xii, 31. The latter passage states that he put the people of Rabbah "under saws, and under harrows of iron, and under axes of iron, and made them pass through the brickkiln; and thus did he unto all the cities of the children of Ammon."

On *Hebrew Warfare*, see especially Letourneau, *La guerre*, etc., ch. 13.

[20] Deut. xx, 10–20. It was also the custom of the Egyptians to issue a summons to surrender before proceeding to extremities. In case of a favorable response to such a summons, the inhabitants were treated as friends, and a moderate tribute

If the ancient Israelites stand relatively low in the scale of civilization as measured by the standard of humanity in warfare, it should never be forgotten that we owe to Hebrew seers and prophets the highest ideal of peace which the world possesses — the vision of the Millennium or Heavenly Jerusalem. This ideal, which was incorporated into Christianity by its Founder, finds its highest and most poetical expression in the identical language of Micah and Isaiah: "And they shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more."[21]

23. **The Assyrians and Babylonians.** — The monuments of Assyria and Babylonia, as also the records of the Hebrews, bear witness to the barbarity of the Assyrians and certain of the Babylonian monarchs in warfare. The bodies of the slain were often mutilated, and rebel captives were impaled and subjected to the most horrible tortures.[22] Those who escaped were chained and enslaved. Whole nations were transplanted from one part of the empire to another.[23] The writings of the Hebrew prophets,

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was imposed. 1 Brugsch, 402. From which we may infer that at least some of the provisions of the much-lauded Mosaic code were borrowed from the Egyptians.

[21] Isaiah ii, 4, and Micah iv, 3. *Cf.* Isaiah xlv, 25: "The wolf and the lamb shall feed together, and the lion shall eat straw like the bullock; and dust shall be the serpent's meat. They shall not hurt nor destroy in all my holy mountain, saith the Lord."

[22] For details, see Maspero, *Struggle*, etc., 634 ff. See especially the Inscription of Asshurnazirpal, in 2 *Records of the Past* (new series), 134–177.

This cruel and vainglorious monarch makes the following boast: "The nobles, as many as had revolted, I flayed; with their skins I covered the pyramid. Some (of those) I immured in the midst of the pyramid; others I impaled above the pyramid on stakes; others, round about the pyramid, I planted on stakes; many at the exit from my own country I flayed; with their skins I clad the fortress walls," etc. Col. I, 11, 90–92, of the Inscription of Asshurnazirpal. *Cf.* the translation of another inscription in Goodspeed, *History of the Babylonians and Assyrians*, p. 197.

It should be noted that these are cases of punishment for rebellion. "Countries for the first time summoned to submit to Assyria, if they resisted, were subject to the ordinary fate of the conquered, but not otherwise treated with special cruelty." Goodspeed, *op. cit.*

[23] For example, the Israelites from Samaria to Mesopotamia and Media, and the Jews from Judea to Babylon. This policy of transportation, which appears to have been inaugurated by Tiglathpileser I (about 1100 B.C.), was carried out on a colossal scale by conquerors like Tiglathpileser III (745–727) and Nebuchadnezzar II (604–562). There are instances of its application in Roman history. It was also practiced by the Byzantine Emperors and even by Charlemagne.

more especially of Jeremiah, contain a vivid portrayal of the terrible sufferings and devastations which resulted from the invasions of Nebuchadnezzar II, King of Babylon (604–562).

24. **The Medes and Persians.** — The barbarous Medes and Persians could hardly be expected to mitigate the horrors and cruelties of oriental warfare. The pages of Herodotus contain many examples of the arrogance and ferocity of their monarchs.[24] Men, women, and children were put to death or enslaved. Whole populations were transported.[25] Mutilation of the dead and torture of the living were freely practiced. Corruption through bribery and the encouragement of habits of luxury appear to have been used as a means of conquest and government.[26]

There are, however, some lighter shades to this picture. The treatment of Themistocles by Artaxerxes was a notable instance of oriental hospitality which the Persians, better than the Jews or the Egyptians, knew how to practice. There was, it seems, at the Persian court a minister specially charged with the care and entertainment of guests.[27] Besides, in dealing with the class of facts cited above, we should remember that the events recorded are scattered throughout an immense period of time, and that the ancient historian, like the mediæval chronicler or present-day journalist, as a rule reported the extraordinary and exceptional rather than the ordinary and normal occurrences of everyday life. Moreover, as Laurent observes: " The words kingdom, empire, republic, should not mislead us into believing in the existence of political unity where there reigned a great diversity. India has always formed an assembly of small associations without any consciousness of a common country. The Persians were only a juxtaposition of peoples and cities." [28]

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[24] Judging from both Greek and Hebrew sources, Cyrus, the founder of the Persian Empire and one of the greatest men of antiquity, appears to have been an exception to this rule.

[25] *Cf. e.g.* the treatment of the corpse of Amasis by Cambyses (Herod. III, 16) with that of Leonidas by Xerxes (Herod. VII, 238).

[26] See *e.g.* the advice of Crœsus to Cyrus — advice which is said to have been followed — to render the Lydians effeminate (Herod. I, 155). Greek statesmen frequently yielded to the temptations of Persian gold.

[27] Laurent, who reports this fact, together with many others (see 1 *Études sur l'humanité*, p. 477), adds: "It is a beautiful symbol of the mission which belongs to the department of foreign affairs. The diplomacy of the future, ceasing to be inspired by hate, will have no more important function than that of cultivating relations of friendship between nations."

The Persians were not wholly ignorant of the value of arbitration as a means of preventing war. Herodotus (VI, 42) relates that Artaphernes, the satrap of Sardis, compelled the cities of Ionia "to make agreements among themselves, so that they might give satisfaction for wrongs and not plunder one another's land."

25. **The Phœnicians and Carthaginians.** — The Phœnicians are the first real commercial people with whom history makes us acquainted. Ancient commerce, in its beginnings at least, was a species of war, or, worse still, of piracy and brigandage. The colonies of Phœnicia and Carthage were established by violence.[29] To the horrible native barbarity of Phœnician warfare,[30] there was added the oppression and suffering wrought by the greed of merchants and systematic commercial exploitation. Wars partook of the nature of commercial ventures carried on by mercenary soldiers, and the hope of plunder became the guiding motive of foreign policy. The traders of the Mediterranean were dominated by material considerations, instead of by dreams of military glory and the passions inspired by religious zeal which animated great conquerors like Thutmos III, Tiglathpileser III, Nebuchadnezzar II, and Cyrus the Great.

The Carthaginian merchants placed restrictions and prohibitions upon trading by foreigners, and the navigation of the seas was forbidden even to colonies, their ports being closed.[31] Carthage, indeed, resorted to the most violent measures in order to secure commerce in the Mediterranean.[32] Her treatment of subject races was cruel and selfish in the extreme.[33]

26. **The Interstate Relations of the Greeks.** — In the Hellenic world the conditions were favorable to the growth of principles and fixed customs of an intermunicipal jurisprudence. The

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[28] There were of course some notable exceptions to this rule, as, *e.g.* Egypt, Assyria, and the Hebrew kingdom of David and his successors.

[29] Laurent, I, 500.

[30] For examples of mutilation and torture, see Judges i, 7; 1 Samuel xi, 2; 2 Kings viii, 12.

[31] Laurent, I, 544.

[32] Montesquieu (*Esprit des lois*, Bk. XXI, ch. 11) observes that "Carthage had a peculiar law of nations. She caused all strangers who traded in Sardinia and towards the pillars of Hercules to be drowned." Grote (Pt. II, ch. 18) says they drowned "any commercial rivals when they could do so with safety."

[33] Polybius (I, 72, trans. by Shuckburgh) thus describes their treatment of the Libyans: "They had exacted half of all agricultural produce; had doubled the tribute of the towns; and in levying these contributions, had refused to show any indulgence whatever to those who were in embarrassed circumstances."

πόλις or city-state was the center of civic life and the unit or subject of interpolitical relations. But the passion of the Greek for city autonomy greatly outweighed his sense of nationality. In spite of a close community of interests and ideas resting on race, religion, and common customs, the Greeks never developed a very definite body of positive intermunicipal law, as strictly applicable even amongst themselves. Their relations with each other were governed essentially by considerations of interest, convenience, or sentiment based on a sense of kinship and religion which took such organized forms as religious leagues or amphictyonies,[34] political leagues or confederacies,[35] the recognition of the military and political leadership of a single State, called the leader or *hegemon*[36] (ἡγεμών) of Greece, and attempts to maintain a balance of power between leading Greek States.[37]

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[34] Of these the most famous and influential was the Delphic Amphictyony, — a body of representatives of twelve tribes, — instituted for the purpose of safeguarding the interests of Apollo at Delphi. But even the Delphic Amphictyonic League was essentially a religious body (although sometimes perverted to political uses), and did not extend over the whole Greek world. It did, however, recognize some principles of interstate comity and sought to humanize warfare. This is shown by the oath of its members: "We will not destroy any Amphictyonic town, nor cut it off from running water, in war or peace; if any one shall do this we will march against him, and destroy his city." The Delphic League was in no sense a board of arbitration or Federal Council, as represented by some historians. On the Delphic Amphictyonic Council, see especially Darby, *Int. Tribunals* (1904), 1–10; and 2 Phillipson, *Int. Law and Customs of the Ancient Greeks and Romans* (1911), 5–11.

[35] The most important of these were the Peloponnesian League, the Delian Confederacy, and the Achæan and Ætolian Leagues. The two latter were genuine Federal Unions. On these Leagues and Confederacies, see especially Freeman's scholarly work entitled *A History of Federal Government*. The best brief account of Federal Government in Greece is by Greenidge, *Greek Const. History*, ch. 7.

[36] The first hegemon of Greece (in historical times) was Sparta. Her first hegemony lasted from about 550 to 478 B.C., and included the period of the Persian invasions. Then followed the hegemony of Athens, which lasted until 413, the date of the failure of the Sicilian Expedition. The second hegemony of Sparta falls within the period of the downfall of Athens (404) and the King's Peace or Peace of Antalcidas (386). During the period which follows we have a brief revival of Athenian power and the short-lived hegemony of Thebes (371–62). The hegemony in Greece is finally (after the battle of Chæronea in 338) seized by Philip of Macedon.

[37] The interstate relations of Greece during the fourth century, B.C., were to a certain extent controlled by attempts to maintain a balance of power between leading Greek States by Persia and leading Greek statesmen like Demosthenes. The idea was suggested to Tissaphernes, the Persian satrap at Sardis in Asia Minor, by that remarkable political adventurer Alcibiades, although there are earlier instances of its actual application.

During the third century B.C., the leading states of Greece were the Achæan and

27. **Greek Warfare.** — The civilization of Greece not only greatly surpassed that of the Ancient Orient, but compared favorably, in some respects, with that of the modern world. Yet Greek warfare was characterized by great cruelty and severity. Except in Homeric times, mutilation[38] and torture were no longer practiced; but quarter was not always given, and Greek freely sold Greek into slavery. If we compare the fierce combats of Homeric times with the relentless struggles of the classical period, especially during the Peloponnesian War, one can hardly pronounce unreservedly in favor of the latter. The treatment of the inhabitants of Melos[39] by the Athenians, and the debates in the Athenian Ecclesia[40] on the fate to be meted out to the revolted Mytilenæans, show to what lengths the democracy of the most civilized State of antiquity was prepared to go in the practice of a sanguinary creed, based not on the brutal instincts of the barbarian but on pure considerations of state policy or political expediency. It should, however, be pointed out that the "Greeks of the fourth century were more humane than those of the fifth."[41]

28. **The "Customs of the Hellenes."** — In their relations with each other, the Greeks recognized certain laws or "customs of the Hellenes" (*τὰ νόμιμα τῶν* Ἑλλήνων), such as the inviolability of heralds and envoys, the right of asylum or sanctuary, and truces for the burial of the dead. The Bœotians declared that "it was a principle acknowledged by all, that in an inva-

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Ætolian Leagues and the maritime power of Rhodes. All Greece eventually fell under the dominion of Rome in the course of the second century B.C.

On the balance of power in Greece, *cf.* "Essay on Balance of Power," in 1 *Essays* (ed. by Green and Grose), Pt. II, Essay 7; Wheaton, *History*, 16 ff.; and 2 Phillipson, *op. cit.*, ch. 18, pp. 101 ff.

[38] The mutilation of corpses was held by Pausanias to be "more worthy of Barbarians than of Greeks." Herod. IX, 79.

[39] The whole male population of Melos was slain and the women and children sold into slavery. The Dorian people of Melos had committed the offense of trying to remain neutral during the Peloponnesian War. The Athenians frankly repudiated all considerations of justice, and maintained that gods and men alike "always maintain dominion, whenever they are stronger." See Thucyd. V, 105.

[40] For these debates, see Thucyd. III, 37–48. The Ecclesia had decreed that all adult male Mytilenæans should be put to death and the women and children sold into slavery. This decree was afterwards rescinded, and only those guilty of the revolt were tried and executed. But the case was argued in the Ecclesia solely on grounds of public policy or expediency.

[41] 2 Bury, *History of Greece*, 98. On the increasing humanity of the Greeks in the fourth century B.C., see Mahaffy, *Social Life of the Greeks*, 269–271.

sion of each other's territory, they should abstain from injuring the temples that were in it "[42] — a principle admitted by the Athenians, provided it did not conflict with the law of military necessity. Truces or suspension of hostilities for religious purposes, such as attendance upon the Olympic games,[43] were observed, and certain territory, like that of Elis, was accounted more or less sacred and inviolable.[44]

29. **Treatment of Prisoners.** — Prisoners of war, whether Greek or barbarian, who surrendered unconditionally might be put to death or sold into slavery;[45] but later customs brought about a considerable modification of the strict rule. Captives were sometimes admitted to ransom even in the Homeric Age, and Thucydides gives several examples of the exchange of prisoners.[46] The survivors, including women and children, were usually sold into slavery. This was particularly the case with cities which surrendered unconditionally or which were taken by storm.[47]

It was customary to divide the booty amongst the victorious soldiery, *i.e.* after devoting one tenth of the spoil to the gods and a portion to the leaders and warriors who had particularly distinguished themselves. Even landed property was frequently confiscated and thus divided.

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[42] Thucyd. IV, 97. The Athenians had garrisoned and fortified the sanctuary of Apollo at Delium in Bœotia. The Bœotians refused to surrender the Athenian dead unless Delium were evacuated. The Athenians entered the plea of military necessity in reply to the charge of using the sacred water, but claimed that they had not injured the sanctuary. Thucyd. IV, 98. Bury (II, p. 486) correctly observes: "There seems little doubt that the conduct of the Bœotians was a greater departure from recognized custom than the conduct of the Athenians."

[43] Thucyd. V, 49.

[44] *Cf.* Polyb. IV, 73–74; and Strabo, Bk. VIII, ch. 3, 33. Yet the "neutrality" of Elis was frequently violated, especially in later times. Some authorities have seen in the theoretical exemption of Elis from invasion an ancient instance of neutralization. The analogy is evident, but the imperfect "neutralization" of Elis, like that of temples and priests, rested wholly on a religious basis.

[45] The Platæans who surrendered unconditionally to the Spartans in 427 B.C. claimed that "the law of the Greeks is not to kill such." Thucyd. III, 58. But their eloquent plea produced no effect on their hard-hearted judges. In case of conditional surrender, the "condition must be observed at the risk of offending the gods, provided it had been ratified by an oath." Greenidge, *op. cit.*, 47–48.

[46] Thucyd. II, 103, and V, 3. Laurent (II, p. 114) even cites a case of release on parole.

[47] "It is a perpetual law amongst all men that, when a city is taken from an enemy, both the persons and property of the inhabitants belong to the captors." Xenophon, *Cyrop.*, Bk. VII, ch. V, 73.

30. **Treatment of Foreigners.**—In general, the Greeks recognized no obligations to foreigners, *i.e.* citizens of another city or country, unless founded upon the religious duty of hospitality or on treaties (*σύμβολα*) sanctioned by an oath. The *μέτοικοι*, or resident aliens, who were extremely numerous in great commercial centers like Athens and Corinth, could as a rule exercise their rights only through a patron (*προστάτης*).[48] Communities were usually represented in the assemblies and law courts by *Proxeni* (*πρόξενοι*) who held a position somewhat analogous to that of modern consuls.[49] Treaties of hospitality (*ἰσοπολιτεία*) sometimes provided for reciprocity or equality of civil rights,[50] and prescribed rules for the settlement of commercial disputes.[51]

31. **Arbitration.** — But the most remarkable progress made by the Greeks in the development of interstate relations is to be found in their repeated attempts to prevent hostilities or to secure peace through arbitration. It must be admitted that such efforts were often unsuccessful,[52] but they deserve credit for making the attempt. The arbitral clause (an agreement beforehand to sub-

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[48] Corinth seems, however, to have been an exception to the general rule. In Corinth the resident alien could probably enforce his private rights in his own name. Greenidge, *op. cit.*, 8. In Athens, the Archon Polemarchus had general jurisdiction over foreigners. See Aristot., *Const. of Athens*, 58. In course of time the Greeks gradually relaxed in their attitude toward foreigners. Actual practice varied greatly at different times and in different places. At the two extremes stood Athens and Sparta — the former being extremely lax or liberal, the latter very strict and exclusive.

[49] But the Greek *Proxenus* was usually a citizen of the State where the aliens whose interests he represented resided. Thus Alcibiades represented the interests of Sparta at Athens. For a very scholarly work on the Greek *Proxeni*, see Monceaux, *Les proxenies grecques* (1886). See also 1 Phillipson, *op. cit.*, 147–156.

[50] Such as intermarriage and property rights. In a few cases they seem to have even provided for an interchange of political rights. Such a close alliance was known as a *συμπολιτεία*.

[51] They sometimes provided even for the selection of judges who formed a species of international court to which the foreigner might appeal without the intervention of a patron. See Greenidge, p. 54; *cf.* 2 Laurent, 123. On *Rights and Duties of Foreigners in Greece and Rome*, see 1 Phillipson, *op. cit.*, chs. 5–12.

[52] For examples of arbitration, see Plutarch, *Solon*, 10; *Ibid.*, *Themis.* 24; Herod. V, 83, 95, and VI, 108; Thucyd. V, 31; 2 Phillipson, ch. 20; and Egger (*Les traités chez les grecs et les romains*, 67 ff.), who cites a number of cases of arbitration from the inscriptions. For an interesting example of arbitration between Priene and Samos, recently unearthed, see 5 *A. J.* (1911), 465–466.

mit disputes to judicial decision) was sometimes inserted into treaties.[53] The arbitrations "related to disputes touching religion, commerce, boundaries, and the possession of contested territories, especially of the numerous islands scattered among the Grecian seas."[54] The arbitrators selected might be noted individuals, friendly cities, or the Oracle of Delphi. It apparently was the opinion of the greatest historian of Greece that "it is not right to attack as a transgressor him who offers to submit to judicial decision."[55]

32. **Greek Maritime Law.** — In the field of maritime law, the Greeks also seem to have made some progress. Although piracy, which was regarded as honorable[56] in the Homeric Age, was still practiced during the classical period, it had been largely supplanted by legitimate and peaceful commerce. The first State which appears to have developed a body of maritime law was Rhodes, the leading commercial State of Greece during the third century B.C. Of this law, which is by some authorities supposed to have been adopted by the Roman Emperors, and some of the principles of which may have survived in the *Consolato de la Mare* of the Middle Ages, but one sentence has survived, at least in its original form. It constitutes the basis of the present doctrine of jettison. "If goods are thrown overboard to lighten the ship, as this is done for the sake of all, the loss shall be made good by a contribution of all."[57]

33. **The "Law of All Mankind."** — Although even Aristotle regarded barbarians as slaves by nature, to whom the "laws of the Hellenes" did not apply, yet the Greeks recognized a vague and ill-defined "law of all mankind" (*τὰ πάντων ἄνθρωπων νόμιμα*).[58] This "law" included at least the inviolability of

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[53] As, for example, in the Truce of 423, and the Peace of Nicias between Athens and Sparta in 421 B.C. See especially the treaty between Argos and Sparta, Thucyd. V, 79. *Cf.* Thucyd. I, 78; IV, 118.

[54] Historical note on Arbitration, in 5 Moore, *History of Arbitration*, Appendix III, 4821.

[55] Thucyd. I, 85. For offers of arbitration, see Thucyd. I, 28, V, 41, and VII, 18.

[56] Thucyd. I, 5.

[57] Justinian's *Digest*, XIV, 2. On the so-called Rhodian Law, see an interesting article by Benedict, in 18 *Yale Law Journal* (Feb. 1909); and Ashburner, *The Rhodian Sea-Law* (1909).

[58] On the "law of all men," see Herod. VII, 13; and Polyb. II, 58, and IV, 6.

heralds and envoys, sanctity of those treaties which were sanctioned by an oath, and certain obligations of alliance and hospitality.[59]

34. **The Policy or Diplomacy of Rome.** — The city-state of Rome first appears in the history of interstate relations as a member of the Latin League or Confederacy, of which she in time became the head and master. Through her renewal of the Latin Alliance in 493 B.C.,[60] and her treaty with the Hernicans (486),[61] she laid the foundation of Roman power in Italy, the conquest of which, completed by 272 B.C.,[62] was at least as much the effect of statecraft or diplomacy as of force.[63] As a result of the Carthaginian and Macedonian Wars which followed the conquest of Sicily (241), Rome was drawn into the current of a world-wide imperialism, from which she ultimately emerged

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[59] Several instances of the violation of this "Law of All Nations" are recorded by Herodotus (VII, 13) and Thucydides (II, 67).

[60] This treaty, negotiated by Spurius Cassius, the historical founder of Roman diplomacy, became the model for treaties of equal alliance. "There shall be peace between Romans and all communities of the Latins, as long as heaven and earth endure; they shall not wage war with each other, nor call enemies into the land, nor grant passage to enemies: help shall be rendered by all in concert to any community assailed, and whatever is won in warfare shall be equally distributed." Dionys. VI, 95.

[61] The particular object of this alliance was to sever the Æquians from the Volscians and thus isolate the latter. It seems to have been the first application of the fundamental principle of Roman diplomacy — *divide et impera.*

[62] *I.e.* as far north as Cisapline Gaul and as far south as Sicily. It is not quite correct to speak of the *conquest* of Italy. It was as the head of a powerful confederacy of Latin and Italian allies rather than as the conqueror or absolute sovereign of subject tribes and cities that Rome first appears as a great World Power. Though about one fifth of Italy was incorporated directly with the Roman Republic, it was rather by way of alliance or confederation than of direct annexation that the Roman mastery over the various races and cities of the Italian peninsula was obtained. These were placed in a condition of varied and unequal alliance with and dependence on Rome and isolation from each other. See especially Beloch, *Der italische Bund* (1880), on the Italian Confederacy.

[63] Ortolan (*History of Roman Law*, Cutler's ed., 1896, § 181) thus admirably sums up the foreign policy of the Roman Republic: "To sow discord among different nations in order to array one against another, — to assist the vanquished in conquering their conqueror, — to husband its own resources, to use those of its allies to invade the territories of its neighbors, — to interfere in the disputes of other States, so as to protect the weaker party and finally subjugate both, — to wage unnecessary wars, and prove itself stronger in reverses than in success, — to evade oaths and treaties by subterfuge, — to practice every kind of injustice under the specious guise of equity — this was the policy that gave Rome the scepter of all Italy, and which was destined to secure for it that of the entire known world."

(about 146 B.C.) master, indeed, of the nations of the Mediterranean, but with her political liberties destroyed, her economic welfare impaired, and her national character greatly weakened.

35. **Roman Attitude toward the Conquered and Idea of a Common Superior.** — In the treatment of the conquered and the organization of her conquests, the conduct of Rome was almost wholly controlled by motives of public policy or a more or less enlightened sense of political expediency. Her aims and achievements constitute in themselves a denial of the rights of other communities and nationalities, and it is possible, therefore, to speak of a Roman Law of Nations only in the most restricted sense, unless it be at a very early period in the history of Rome. The world was dominated by a common superior, — first the Roman Senate and later the Roman Emperor, — who, for centuries, either directly or indirectly, ruled the provinces and vassal States and races of the Mediterranean world. This idea of a common superior, mediator, or arbitrator strangely persisted through the Middle Ages. It seems to have been due to the survival of historic traditions and recollections of the benefits conferred upon the world by the "Roman Peace" (*Pax Romana*) and the impartial administration of Roman justice under the Early Empire.

36. **The *Jus Belli* of the Romans.** — In their attitude toward foreigners and in respect to the laws and customs of warfare (*jus belli*), the Romans greatly resembled the Greeks.[64] As in the case of the Greeks, Roman usages of war were based upon a sense of religious obligation, but were modified by considerations of interest and the necessities of intercourse. The treatment of foreigners was more liberal at Rome than in Greece, and the foreign policy of Rome was certainly guided by a wiser statesmanship and a more enlightened sense of self-interest than that which characterized the Greeks. The Romans were both by training and temperament more calculating and judicial than the Greeks, and they had a greater talent for administration and organization.

In view of the general similarity between Greek and Roman conceptions of international rights and duties, we need only notice two branches of Roman law which concern international jurisprudence. One of these is of slight importance, the other of very great influence on the subsequent development of the Law of Nations.

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[64] On the *jus belli* as practiced by the Romans, see Polyb. V, 11. The ideas of Cicero were more liberal, but seldom practiced. On Cicero's theory of international morality, see Wheaton, *History of the Laws of Nations*, 20–24.

37. **The *Jus Fetiale.*** — The *jus fetiale* consisted of certain rules and ceremonies or modes of procedure for declarations of war and ratification of treaties of peace, which were of great antiquity and were intended to satisfy the religious scruples and sensitive " legal conscience " of the Romans.[65] They were highly ceremonial and formal in character, and their guardianship was intrusted to a special body of priests known as the College of Fetiales. Only four just (*i.e.* legal) causes of war were recognized,[66] but it cannot be maintained that this had any appreciable influence on Roman practice, at least in historical times. The *fetiales* were mere agents of the Senate, and were practically bound to do their bidding; for in Rome religion was the servant and not the master of the State.

38. **The *Jus Gentium.*** — The *jus gentium* belongs to the field of International Private Law rather than to that of the Law of Nations; but owing to its influence upon the thought of the later Middle Ages and the writings of publicists like Gentilis and Grotius, it became a very important factor in the growth of modern International Law. It consisted in that body of principles and usages common to all nations (including the Italians) among whom justice was administered by Roman

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[65] In Greece war was usually declared through a herald; but the Greeks seem to have been less strict in this respect than the Romans, for there are instances of war without declaration.

[66] These were: (1) Invasions or violations of Roman territory; (2) and (3) violation of the rights of ambassadors and of treaties or alliances; and (4) military support given to an enemy or attack upon an ally by a hitherto friendly State. Even in these cases war was only justifiable after satisfaction had been demanded and refused. In case of refusal, war was formally declared by hurling a spear across the Roman frontier into the enemy's territory. For a description of this ceremony, see Livy, I, 32. On the *jus fetiale*, see especially Hill, *History of European Diplomacy*, I, pp. 8–11 and notes; and 2 Phillipson, *op. cit.*, ch. 26.

War might be ended in three ways: (1) By a treaty of friendship or alliance; (2) a *deditio* or unconditional surrender (in this case the lives and property of the enemy were generally spared); (3) by *occupatio* or conquest and appropriation of the enemy's territory, or a considerable part thereof. For the formula of *deditio*, see Livy, I, 38. On the significance of *deditio*, see Polyb. XX, 9; XXI, 3, and XXXVI, 4. For terms imposed upon the Ætolians, see Polyb. XXI, 32; and Livy, XXXVIII, 11.

magistrates. Although it included some rules or principles of International Public Law (as, *e.g.* the inviolability of ambassadors), it was wholly different in origin, nature, and subject matter. It originated in the jurisdiction of the *prætor peregrinus* over foreigners (including Latins and Italians) and in relations between Romans and foreigners in Rome and Italy. It related to such matters as verbal contracts, partnerships, loans of money, acquisition by delivery and *alluvium*, capture and war, rights over slaves, rights of self-defense, etc. Some of its rules, as, for example, those relating to the law of *alluvium*, the right of occupation of *res nullius*, and the absolute ownership of land by the Roman *dominus*, were directly appropriated by Grotius and the other founders of International Law, and later applied to international practice. The *jus gentium* of the Romans may thus be regarded as the source of much of the modern law of occupation and territorial sovereignty or jurisdiction.[67] In the minds of the later Roman jurists, who were strongly impregnated with the doctrines of Stoic philosophy, its more general principles were practically identified as Laws of Nature.

But the Roman *jus gentium* performed a still more important function in the history of international jurisprudence. In common with the Canon Law and the Civil Law (into which its more positive rules were incorporated), it greatly influenced the legal conceptions of the Middle Ages, and slowly prepared the way for that "reign of law" and order which is perhaps the most essential condition of a higher civilization, and which is being gradually extended to international relations.

39. **The "Dark Ages."** — As a result of the decline of the Roman Empire in the course of the fourth and fifth centuries A.D., due to internal decay and the irruptions of the barbarians, the western world relapsed into that barbarism from which it slowly emerged after the eleventh century. It has been said that "International Law reached its nadir in the West"[68] at this period during the so-called "Dark Ages" between the final disappearance of the Western Empire in 476 and the coronation of Charlemagne as Emperor of the West by Pope Leo III in

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[67] For references on the *jus gentium*, see Bibliography at the end of this chapter.

[68] Walker, *History of the Law of Nations*, p. 64.

800 A.D. In spite of the pacific teachings of Christ and the early Fathers of the Church, " the history of the wars of Clovis, the hero of the orthodox clergy, is the tale of savage murder and the most hateful treachery."[69] Some traditions of a higher civilization were, however, preserved at Byzantium, and also among the Mohammedan Arabs or Saracens, whose international practice contrasts very favorably with that of the barbarian Christians of Western Europe.[70]

40. **The Age of Feudalism.** — The Age of Feudalism, which characterized the civilization of Western Europe from the ninth to the fifteenth centuries, was a period of organized anarchy and private warfare or regulated violence. Society was divided into feudal groups, of which the basis was the fief, — usually a grant of land by the lord to one of his vassals. With the social and political relations within these groups, we need not here concern ourselves. Suffice it to say that feudalism was essentially a highly complicated system of land tenure based on military, personal, or economic service. It was a form of social and political organization of which the lord, vassals and other tenants (villeins, serfs, etc.) constituted the military and political units, the lord or landowner exercising suzerain or quasi-sovereign functions based on territorial rights — an idea which played a highly important part in the development of the science of International Law.[71]

Interfeudal relations were of the loosest kind. In spite of legal forms and customary law, they were controlled by brute force or regulated violence. The wager of battle was a recognized form of judicial trial, and private warfare appears to have been the rule rather than the exception.[72] " War in all its forms may be said to have been the law of the feudal world." It "raged not only between suzerains and vassals of the same fief, but also in the bosom of all the feudal families."[73] The attitude of the feudal lord toward trade and the foreigner is shown by his numerous exactions, such as tolls, the claim of a right to the property of the shipwrecked (*droit de naufrage*), and his claim to inherit the property of the foreigner (*droit d'aubaine*).[74]

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[69] Walker, *History of the Law of Nations*, p. 65.

[70] On the international practice of the Saracens, see Bordwell, *Law of War*, 12–14; Syed H. R. Abdul Majid, in 28 *L. Q. R.* (1912), 89 ff.; and Walker, *History*, 45, 57, 58, and 66. *Cf.* Nys, *Études*, I, 46–74, and *Origines*, 209 f.

[71] See especially Esmein, *Cours élémentaire d'histoire du droit français* (1901), 175–184. Trans. in Munro and Sellery, *Mediæval Civilization* (enlarged ed., 1907), 159–167.

[72] Private warfare was regulated in the course of the twelfth, thirteenth, and fourteenth centuries. It was usually preceded by a challenge, and terminated by a truce, peace, or promise to keep the peace by one of the adversaries. As a rule, the right of private warfare was limited to noblemen. As an old adage expressed it, "Only a gentleman may engage in warfare." In any case, ecclesiastics, women,

41. **Influence of the Mediæval Church.** — But there were certain unifying, formative, and civilizing influences at work even in Western Europe during the Middle Ages. These were, first and foremost, the Catholic Church, as represented by the Roman Papacy. Though mainly intent upon its own aggrandizement and the salvation of the individual soul from torment in another world, the mediæval Church finally awoke to some sense of its humanitarian and international mission, and made efforts to establish peace by means of the Truce of God and the Peace of God in the eleventh century.[75]

These attempts were, however, only partially successful. More effective were such institutions as the *Quarantaine le Roy* (an enforced lapse of forty days between the outbreak of a quarrel

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pilgrims, and minors were usually exempt from hostilities. In France, it was prohibited in 1361, but was not suppressed until Louis XI broke the power of feudalism toward the close of the fifteenth century. In Germany, *Faustrecht* (fist-right) continued up to the middle of the sixteenth century. On private warfare in the Middle Ages, see especially Luchaire, *Manuel*, 228–234; Nys, *Origines*, ch. 5; and Du Cange, *Des guerres privês* (1838), cited by Bordwell, 15.

[73] See the translation from Luchaire, in Munro and Sellery, 171–187. The citation is on p. 177.

[74] Of course there were many exceptions to this rule. In England, *e.g.* many statutes were passed for the protection of the foreign merchant. Walker, *History*, 120–121.

[75] The movement for a "Truce of God," which set aside certain days in the week and seasons of the year for the practice of private warfare, originated in Aquitaine at the close of the tenth century, spread to neighboring French dioceses, and culminated in the Council of Clermont in 1095. But this movement failed to accomplish its purpose.

In the second half of the eleventh century, the Church made a systematic attempt to establish the "Peace of God." Peace Leagues or Associations, with regular statutes, treasury, and magistrates, were established in each diocese under the direction of the bishop, who did not hesitate to use force, if excommunication failed. Violators of the peace were brought before the "judges of the Peace," and if found necessary, punished by an "army of the Peace." Even these efforts were only partially successful. See Luchaire, in Munro and Sellery, 183–184.

For texts of the *Truces of God*, see University of Pa. *Trans. and Reprints*, I, 8–12; and Henderson, *Select Documents*, 208–211.

and the opening of hostilities) in France, the King's Peace in England, and the various *Landesfrieden* in Germany. Most effective of all was the gradual substitution of royal for feudal justice.

42. **Common Elements in the Civilization of Feudal Europe.** — Yet in spite of its reactionary and anarchical tendencies, feudal Europe contained elements which were favorable to the development of a higher civilization based on the idea of a brotherhood of nations. Throughout Christendom, there were common religious beliefs and forms of worship, common customs and standards of living amongst those with the same social status, a language (Latin) common to the educated classes, great Church councils representing various races and nationalities, trade, pilgrimages, and intercourse of various sorts resulting in the interchange of ideas as well as of material goods, and finally the common hatred of the infidel and a general desire to regain possession of the Holy Sepulchre which culminated in the Crusades.

43. **The Papacy and Empire.** — Although important unifying or organizing and civilizing influences, it cannot successfully be maintained that either the Mediæval Papacy or the Holy Roman (Germanic) Empire exerted strong direct influence upon the amelioration of warfare or the development of International Law. True it is that the Papacy and Empire of the later Middle Ages were great international forces (although often in conflict with each other), and that the Popes and, to a much less degree, the Emperors frequently acted as arbitrators and mediators between kings and princes. But their power rested mainly on a theoretical and sentimental or religious basis, and declined rapidly after the middle of the thirteenth century.[76]

44. **Arbitration during the Middle Ages.** — Arbitration was very common in the Middle Ages, but such was the almost

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[76] The pretensions of both Papacy and Empire at the height of their power went far beyond mere mediation and arbitration. Their claims amounted to an assertion of universal dominion and often resulted in actual intervention. These claims were usually admitted in theory, but denied in practice.

A serious obstacle to the efficacy of the Papacy as an arbitrator or mediator was the doctrine that "no faith need be kept with heretics," and the assertion of its right to break treaties and annul oaths "contrary to the interests of the Church." See an interesting article by White, in 95 *Atlantic Monthly*, 107 ff.

universal reign of anarchy and violence that it cannot be said to have very materially mitigated the rule of warfare as the normal condition of that unhappy time. Feudalism was in so far favorable to arbitration as to predispose vassals to accept their lords as judges, and it accustomed them to the idea of arbitration. Kings, bishops, eminent jurists, and even cities were also chosen as arbitrators during the Middle Ages. There are said to have been no less than one hundred instances of arbitration in Italy alone in the course of the thirteenth century. Arbitration declined during the fourteenth and fifteenth centuries, and almost disappeared from international usage during the seventeenth and eighteenth.[77]

45. **The Influence of Roman Law**. — More important than the direct influence of the Empire, or even than that of the mediæval Church, in the history of the growth of International Law were the indirect influences resulting from the revived study of the Roman Civil Law by the jurists of the twelfth century, the publication of the famous *Decretum* of Gratian in 1144, and the codification of the Canon Law modeled on the *Corpus Juris Civilis* by Gregory IX in 1234. The systematic study and application of the principles of the Roman Law furnished a necessary foundation for the later growth of the royal power and the development of an adequate and enlightened system of international jurisprudence.[78] This study bore fruit later in many a law, custom, decision, pamphlet, monograph, and treatise.

46. **Effect of the Crusades**. -- Perhaps the most important single influence of the later Middle Ages upon the development of international relations was that of the Crusades of the twelfth and thirteenth centuries (1096-1291).[79] Though attended with frightful waste and misery, they enlisted the zeal of Christians

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[77] See especially the historical note in 5 Moore, *History of Arbitration*, App. III, 4825 ff.; and Nys, *Les origines*, ch. 4.

[78] On the influence of the Roman Law upon the formation of International Law, see especially Maine, *Ancient Law* (Pollock's ed.), 92 ff. and note H in Appendix; *Ibid.*, *Int. Law*, 20, 26–29; Wheaton, *History*, etc., 29 ff.; Calvo, 12–13; and for further references see Bibliographies on *jus gentium* and *jus naturale*, *infra*, pp. 54–55 and 91.

[79] On the effects of the Crusades, see especially: Adams, *Civilization of the Middle Ages*, 270 ff.; Chauveau, *Introduction*, 135 ff.; 4 Milman, *Latin Christianity*, Bk. VII, ch. 6; Bémont and Monod, *Mediæval Europe*, ch. 22; Emerton, *Mediæval Europe*, 388–397; 1 Hill, *History*, 368 ff.; Munro and Sellery, *Mediæval Civilization*, 253–256; Walker, *History*, 87 ff.

of various nationalities. They could not therefore fail to stimulate trade and the interchange of ideas, arouse a keener sense of common interests, and awaken a deeper consciousness of the unity of Christendom. They also prepared the way for the destruction of feudalism by weakening the resources of the nobility — a condition from which the free cities and kings were not slow to profit.

47. **Influence of Chivalry.** — The influence of chivalry upon the amelioration of warfare has probably been exaggerated. Although it undoubtedly tended somewhat to soften manners and humanize the conduct of the nobles during the later Middle Ages, it is an open question whether its tendency was not rather to increase than to mitigate the barbarities of mediæval warfare, which often rivaled, if indeed they did not sometimes exceed, those of the ancient Orient.[80] The obligation of chivalry extended only to equals, and the desire for ransom added the motive of greed to the lust for combat and the exercise of brutal passions.[81]

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[80] On the barbarities of mediæval warfare, see Nys, *Origines*, ch. 11; Walker, *History*, 63 ff.; Hosack, *History of the Law of Nations*, chs. 2–4; Ward, *Enquiry*, etc., I, chs. 8–9, and II, ch. 14.

Nys (*Origines*, p. 188) gives the following summary of the character of mediæval warfare: "In the Middle Ages war bears the stamp of an indescribable cruelty; adversaries injure each other as much as possible; the annihilation of the enemy is the final end of hostilities. Hence, unheard-of acts of barbarity; the use of poisoned weapons; the mutilation of prisoners, devastation, the sack and destruction of towns; recourse to treason and perfidy. We are unable to furnish a complete picture of the atrocities committed."

The Church made some slight efforts to mitigate the horrors of warfare, as, *e.g.* its prohibition of the use of the crossbow and of projectiles hurled from machines, but these efforts were unsuccessful. It also condemned the enslavement of Christian prisoners. Although prisoners were often massacred and sometimes enslaved, the Church deserves the gratitude of mankind for its crusade against slavery.

Prisoners of note were generally ransomed, sometimes exchanged, and in a few cases released on parole. In the latter case hostages were usually given.

[81] The following passage from a Christian historian descriptive of the capture of Jerusalem, which was taken by storm on July 15, 1099, may serve as an illustration of the unrestrained brutality of the Crusaders when their fierce and unbridled passions were aroused: "No barbarian, no infidel, no Saracen, ever perpetrated such wanton and cold-blooded atrocities of cruelty as the wearers of the cross of Christ on the capture of that city. Murder was mercy, rape tenderness, simple plunder the mere assertion of the conqueror's right. Children were seized by their legs, some of them were plucked from their mother's breasts and dashed against the walls or whirled from the battlements. Others were obliged to leap from the walls; some tortured, roasted by slow fires. They ripped up prisoners to see if they had swallowed gold. Of 70,000 Saracens there were not left enough to bury the dead; poor

48. **Influence of Mediæval Commerce.** — Another important influence upon the development of the Law of Nations was that of mediæval commerce, which centered in certain Italian cities [82] of the Mediterranean, and was greatly stimulated by the Crusades. It flourished in spite of war, piracy, and the opposition of the Church, and was later extended to the north by way of the Atlantic as well as along overland routes. The desire to protect and extend mediæval commerce led to the formation of leagues of cities. The most important of these confederacies was the Hanseatic League (1250–1450) which, at the time of its greatest extent, " included more than ninety cities of the Baltic and North Sea regions, both seaports and inland towns." [83]

49. **The Discovery of America.** — The necessity for opening up new trade routes to India, which resulted from the Turkish conquests of the fifteenth century (more particularly the capture of Constantinople in 1453), led to the discovery of America and the circumnavigation of Africa and the globe. These, in turn, transferred the center of greatest commercial activity from the Mediterranean to the Atlantic, and greatly extended the circle of international and commercial relations.

50. **The *Consolato del Mare*.** — It is to mediæval commerce that we owe those collections of maritime law which have exercised such a great influence upon the subsequent development of this branch of international jurisprudence. By far the most important of these was the *Consolato del Mare*,[84] a private collec-

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Christians were hired to perform the office. Every one surprised in the Temple was slaughtered, till the reek from the dead bodies drove away the slayers. The Jews were buried alive in their synagogues." 4 Milman, *History of Latin Christianity*, p. 37 (American ed., 1881). Cited by Hosack, *History of the Law of Nations*, p. 68. Hosack adds that the brutality of the Crusaders has often been contrasted with the remarkable generosity with which Saladin, the renowned Sultan of Eygpt, treated the captive Christians when he retook Jerusalem in 1187.

[82] The most important of these were Amalfi, Venice, Pisa, and Genoa.

[83] Harding, *Essentials in Mediæval and Modern History*, p. 187. See map on pp. 184–185, showing extent of mediæval commerce, trade routes, and the Hansa towns and settlements. The objects of the League were common defense, the acquisition, maintenance, and security of trade; and it provided for the settlement of disputes between members by arbitration.

[84] On the *Consolato del Mare*, see especially Pardessus, *Us et coutumes de la mer*, I, 21–34, 206–209, and II, 1–368 or ch. 12. For English translations of the most famous chapters of the *Consolato*, see Wheaton, *History*, 63–65; and Manning, 280–283. Both are copies of Robinson's translation of the Prize Chapters of the *Con-*

tion of rules derived from maritime practice in the Mediterranean, which was published in Barcelona, Spain, in 1494.[85]

These rules showed a remarkable liberality toward friends or neutrals. They made ownership of the ship and goods the test of liability to forfeiture, and laid down the principle that a friend's goods found on board an enemy ship were to be restored to the owner on payment of the freight. It was even provided that the owner of the cargo might purchase the vessel at a suitable price. On the other hand, enemy goods found on a neutral vessel were subject to confiscation, although even in this case the vessel, which might be compelled to carry the cargo to a place of safety, was restored to its owner, who received the same freight that he would have received if the goods had been carried to their original destination.

51. **The Mediæval Origin of the Modern Consulate.** — The interests of mediæval commerce led to the establishment of consulates. At least as early as the twelfth century, naval and merchant consuls (*consules marinariorum et mercatorum*), chosen by the seamen or merchants themselves, settled disputes among their countrymen and represented the interests of the seamen and merchants of leading Italian cities in Mohammedan countries. These officials (also called consul-judges) were, at first, generally confined to Oriental countries, where (except in Japan) they still exercise civil and criminal jurisdiction over nationals of their own country. During the thirteenth and fourteenth centuries this institution gradually spread to the West;[86] but, owing to the rise of permanent embassies and the

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solato del Mare, in *Collectanea Maritima*, No. 5. See also 3 Twiss, *Black Book of the Admiralty*, 539 and 611.

Other important mediæval collections or codes of maritime law were: (1) The so-called *Amalfitan Tables*, which appear to date from the eleventh century. (2) The *Laws of Oleron* for Western Europe, which seem to have been completed in the latter part of the twelfth century. (3) The *Laws of Wisby*, dating from about 1288, for the Baltic Nations. (4) The *Maritime Law of the Hanseatic League*, completed in 1614. (5) The so-called *Rhodian Sea-Law* of the Roman Empire and the early Middle Ages, which, however, is generally regarded as apocryphal. It was first published in 1561, though Ashburner (in *The Rhodian Sea-Law*, 1909, p. cxii) presents some strong arguments in favor of his opinion that it was "probably put together by a private hand between A.D. 600 and A.D. 800."

[85] Nys, *Origines*, p. 232. But its actual development dates from a much earlier period, probably the fourteenth century. It was applied by the sea consuls of Barcelona who existed as early as 1279.

[86] In the North, *i.e.* among members of the Hanseatic League, the consular judges

development of the doctrine of territorial jurisdiction, the extraterritorial powers of the consuls greatly declined in the course of the sixteenth century.

52. **The Rise of the Modern European States-system.** — The mediæval consuls were, however, in no proper sense agents or organs of internationalism. Although Christendom was aroused to some sense of its community of interests by the Crusades, mediæval man still lived in a world largely disordered and unorganized, while dreaming of "kingdom come" or the universal rule of Pope or Emperor. The latter dream was dispelled through the mighty forces set in motion by the Renaissance and the Reformation; and the evils of disorder and disorganization were largely overcome through the rise of the modern States-system of Europe, which was based on the ideas of the absolute territorial sovereignty of princes, the legal equality of States, and the maintenance of a balance of power or equilibrium of forces between them.

The main agents in this reorganization of Europe were the cities of Italy, the dynasties of France, England, and Spain (more particularly Louis XI, Henry VII, and Ferdinand of Aragon),[87] and the system of resident embassies which was established first in Italy[88] (from the thirteenth to the fifteenth centuries), and later

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were known as aldermen. Like the consuls of the South, they represented the powerful merchant guilds or corporations rather than the governments. We should remember in this connection that the Middle Ages were still dominated by the idea of *personality of law*, and that it was entirely natural that colonies or corporations of foreigners residing in a certain quarter of a mediæval city should be permitted to administer their own law, and that they should especially demand these privileges in the Orient.

On the *Mediæval Origin of the Consulate*, see Bonfils (Fauchille), Nos. 734–741; 1 Halleck (Baker's 3d ed.), 369–370 and note; * Holtzendorff, in 1 *Handbuch*, § 77; 2 Martens, *Traité*, § 18; Hautefeuille, *Histoire*, 95 ff.; 2 Mérignhac, *Traité*, 314 ff.; 2 Nys, *Droit int.*, 396–400; 1 Oppenheim, § 419; *4 Pradier-Fodéré, *Traité*, Nos. 2036–2043.

[87] These "three magicians" (as Bacon called them), whose reigns fall within the latter half of the fifteenth century, all contributed powerfully to the development of that royal power which resulted in the destruction of feudalism as a political force, the unification and nationalization of the State, and the establishment of the modern States-system of Europe. The main "organizers" of European diplomacy appear to have been Ferdinand of Aragon, Louis XII, and the Emperor Maximilian at the close of the fifteenth century. See 2 Hill, *History*, p. 309.

[88] The researches of Nys (see especially his *Origines*, ch. 14) and others have rendered almost worthless earlier accounts of the origin of European diplomacy. The system of *permanent* resident embassies was unknown to antiquity. It originated

(during the sixteenth and seventeenth centuries) in Western Europe. The idea of the balance of power and equilibrium of forces also found its first modern application in the interstate relations of the leading Italian cities in the fifteenth century,[89] and was later applied in the larger field of general European politics.[90]

53. **The Peace of Westphalia.** — The actual existence of a secular community of States in Western Europe was first fully revealed to the World by the Treaties of Westphalia — the work of the Congress of Catholic and Protestant States which met at Münster and Osnabrück in 1644–1648.[91] This Peace,

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in Italy (Venice taking the lead) in the thirteenth century. In the fifteenth century the Italian cities had permanent representatives in Spain, Germany, France, and England. These States maintained similar relations with one another in the sixteenth century, but the system of resident embassies cannot be said to have been generally established throughout Europe until the age of Richelieu, Mazarin, and Louis XIV in the seventeenth century. The terms "diplomatist" and "diplomacy" did not come into general use, however, until the end of the eighteenth century.

On the origin of *European Diplomacy*, see especially, in addition to Nys (cited above), Baschet, *La diplomatie vénitienne; Ibid.*, *Les archives de Venise* (1870); Bonfils (Fauchille), No. 656; 1 Calvo, § 392; 2 Fiore, No. 1177; 1 Flassan, *Histoire* (1811), *passim;* * Hill, *History of European Diplomacy*, vols. I and II, *passim*, more particularly I, ch. 8, *ad fin.*, and II, chs. 2, 4, and 7; Holtzendorff, in 1 *Handbuch*, § 83; Krauske, *Die Entwickelung der ständigen Diplomatie* (1885); 1 Maulde-la-Claviere, *La diplomatie au temps de Machiavel;* 1 Oppenheim, §§ 358–359; * 3 Pradier-Fodéré, *Traité*, Nos. 1231–1236; *Ibid.*, 1 *Corps diplomatique*, 203–214; 1 Rivier, 431.

[89] *I.e.* Venice, Florence, Milan, Naples, and the Papacy. It was especially applied by Lorenzo de Medici. Italy also seems to furnish us with the first example of the modern State, viz. the centralized administration of Frederick II in Southern Italy and Sicily in the thirteenth century. Burckhardt, *The Civilization of the Renaissance* (Eng. trans. by Middlemore), p. 5. Cited by Nys, *Origines*, p. 166.

[90] Evidences of the application of this idea may be found in the policy of England and France during the sixteenth century, but the balance of power can hardly be said to have been established as a European system prior to the latter part of the seventeenth century. It was first formally and officially recognized by the Peace of Utrecht in 1713.

On the origin of the system of "European Equilibrium," see Nys, *Origines*, ch. 8; 2 Hill, *History of European Diplomacy*, *passim*, particularly, 158, 238, 294 ff.

[91] In the negotiations at Münster and Osnabrück all the leading European powers were represented, except England, Poland, Muscovy, and Turkey, viz. the Papacy, the German Empire, France, Spain, Sweden, Venice, Denmark, Portugal, and the States General of Holland. The various German States and the Dukes of Tuscany, Savoy, and Mantua also sent delegates. The Swiss cantons were represented through the good offices of the French and included in the general pacification. The independence of Holland was also recognized. England and Poland were included

which marks the close of the Thirty Years' War and the establishment of the Modern European States-system on a solid basis, recognized the equality of the Catholic and Lutheran Confessions in Germany and the independence and legal equality of the States (including the 355 sovereignties of Germany) of Western Christendom, whether Catholic or Protestant, monarchical or republican.[92]

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International Law of Antiquity. — 1 Alcorta, *Cours*, ch. 6, sec. 1; Bender, *Antikes Völkerrecht* (1901); Busolt, in Müller's *Handbuch*, IV, 1, §§ 54–76; Chauveau, *Introduction* (1891), § 12; Cybichowski, *Das antike Völkerrecht* (1907); Egger, *Les traités publics chez les grecs et les romains* (1866); * Greenidge, *Handbook of Greek Const. History*, ch. 3, 2; **Ibid.*, *Roman Public Life*, ch. 7; Hermann, *Griechische Antiquitäten* §§ 9–14; * Holtzendorff, in 1 *Handbuch* (1885), §§ 40–64; * Laurent, *Études sur l'humanité* (1879–1880), Vols. I, II, and III; Leseur, *Introduction*, §§ 33–38; Müller-Jochmus, *Geschichte des Völkerrechts im Altertum* (1848); * Phillipson, *Int. Law and Customs of Ancient Greece and Rome*, in 2 vols. (1911); Scala, *Die Staatsverträge des Altertums* (1898); 2 Schoemann, *Griechische Altertümer*, 1–123; * 1 Walker, *History of the Law of Nations* (1899), 20–64; Wheaton, *History of the Law of Nations* (1845), Introduction.

International Law of the Middle Ages. — 1 Alcorta, *Cours*, ch. 6, sec. 2; Chauveau, *Introduction*, § 13; Hosack, *The Rise and Growth of the Law of Nations* (1882), chs. 2–7; * Holtzendorff, in 1 *Handbuch*, §§ 65–84; * Laurent, *Études*, Vols. IV–X, *passim;* Leseur, *Introduction*, §§ 38–54; * Nys, *Les origines de droit int.* (1894); *Ibid.*, *Études de droit int.* (1896 and 1901), in 2 vols., *passim;* * 1 Walker, *History*, 79–201; Ward, *Enquiry into the Foundation and History of the Law of Nations* (1795), in 2 vols. (still useful).

The historical chapters in treatises of International Law are for the most part either slight or practically worthless in the light of our present knowledge. Among the exceptions are Bonfils, Calvo, Despagnet, Martens, Nys, Oppenheim, and Wilson and Tucker (the best of the brief sketches).

Jus Gentium. — 1 Austin (Campbell's ed.), §§ 109–110 and Vol. II, Lect. 31, §§ 791–825; * Bryce, *Studies*, etc., 570–586, 753–754; Carlyle, *Mediæval Pol. Theory* (see index); * Clark, *Practical Jurisprudence*, ch. 14;

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in the Treaty of Osnabrück as allies both of the Emperor and of Sweden. These details are taken from Bernard's interesting essay on "The Congress of Westphalia," in his *Lectures on Diplomacy*, II, ch. 7, *ad fin.*

[92] Of these 355 German States whose sovereignty was practically (although not theoretically) recognized by the Peace of Westphalia, "150 were secular States governed by hereditary monarchs (Electors, Dukes, Landgraves, and the like), 62 were free City-states, and 123 were ecclesiastical States governed by Archbishops and other Church dignitaries." 1 Oppenheim, p. 60.

Dunning, *Political Theories, Ancient and Mediæval; Ibid., From Luther to Montesquieu, passim;* Holland, *Jurisprudence* (10th ed. in 1906), 34–35; Holtzendorff, in 1 *Handbuch*, § 64; Karlowa, *Röm. Rechtsgesch.*, § 59, pp. 451–458; * Maine, *Ancient Law* (Pollock's ed.), 44 ff. and Pollock's note in Appendix, 396 ff.; *Ibid., Int. Law*, 27–29; 1 F. de Martens, 84 ff.; 3 Mommsen, *Röm. Staatsrecht*, 603–606 and notes; Muirhead, *Private Law of Rome*, 240; * Art. on *jus gentium* by Professor Nettleship, in 13 *Journal of Philology*, No. 26; 1 Phillipson, *op. cit.*, ch. 3; * Roby, *Roman Private Law*, 5–6, especially note 2 on p. 5; Salkowsky, *Roman Private Law* (Whitefield's trans.), 10, 30–31; 1 Savigny, *System*, § 23; * Sohm, *Institutes*, §§ 12–13; 2 Taylor, *The Mediæval Mind*, ch. 33; Voigt, *Röm. Rechtsgesch.*, § 15, pp. 152–162; * *Ibid., Jus naturale und jus gentium der Römer* (1856 in 4 vols.), *passim;* * Walker, *History*, §§ 28–29, 85 *et passim;* Westlake, *Chapters*, 18 ff.; Wheaton, *History*, 24 ff.; Wilson, *The State*, Nos. 262 ff.; Willoughby, *Political Theories*, 252–267.

CHAPTER IV

HISTORY OF INTERNATIONAL LAW SINCE THE PEACE OF WESTPHALIA

54. **The Main Factors in the Growth of the Science of International Law.** — The treaties of Münster and Osnabrück gave to Europe a sort of international constitution which remained the basis of its public law down to the French Revolution. But it would be a serious error to assume that the International Community of States as revealed to the world by the Peace of Westphalia implied the recognition of the science of International Law as understood and practiced by the Society of Nations at the present time. The science of International Law as it exists to-day is a result of slow historical growth and is the product of two main factors, viz. certain theories or principles on the one hand, and international practice or custom on the other. The relative value and influence of the contributions of each of these factors is so difficult to determine that they have never been thoroughly sifted or separated — a task left for the future historians of International Law.

55. **The Importance of Jurists and Publicists.** — It is clear, however, that during its formative period International Law was mainly developed by great thinkers and jurists, who were forced to rely upon the weight of general ideas or theoretical considerations, rather than upon any satisfactory body of accumulated custom, if they desired to ameliorate conditions or improve international relations. The fundamental principles of the science once firmly established and recognized in international practice, there was less need for theoretical discussion. It then became the main function of the jurist and publicist to apply and interpret the law in conformity with the best and most authoritative precedents or usages.

56. **Grotius the Founder of the Science of International Law.** — The founder of the *Science* of International Law was Hugo

Grotius, whose main work, entitled *De jure belli ac pacis*, published in 1625 during the midst of the horrors of the Thirty Years' War, marks an epoch in the history of civilization as well as of International Law. Although it was based largely upon the labors of his predecessors,[1] to whom somewhat scant recognition is given by him, Grotius deserves his title of "Father of International Law" from the fact that his was the only work in the seventeenth century which obtained wide circulation and general recognition.[2] This was because it answered the needs of the time, and was the fullest, most attractive, systematic, and scholarly exposition of the subject hitherto attempted. Grotius brought to his work great learning, enthusiasm, experience, and a passion for justice which won for him the hearts as well as the heads of his contemporaries and of posterity.

57. **His Work based on the *Jus Naturale*.** — Like his predecessors and many of his successors, Grotius started from the idea of a universal and immutable Law of Nature (*jus naturale*) based upon right reason and human sociality — a philosophical conception derived from the Stoic philosophers of antiquity, which has dominated Ethics and Jurisprudence until recent times. He claimed for the Law of Nations the authority and sanction of this Law of Nature, a doctrine denied by no one in his day,[3] thus giving it an apparently solid, binding, and rational character which few cared to dispute. Moreover, he fortified his position

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[1] For references and a brief sketch of the "Forerunners of Grotius," see note at the end of this chapter.

[2] This is shown by the facts that at least forty-five Latin editions of his book were issued prior to 1748 and that it had been translated into the leading modern languages before the close of the seventeenth century. See Rivier, in 1 Holtzendorff's *Handbuch*, § 88, for list of editions. Grotius' book made such a great impression upon Gustavus Adolphus that he is said to have slept with it under his pillow during his campaigns in Germany.

Grotius was born at Delft, Holland, in 1583. As a child he was a prodigy, writing Latin verses at nine years of age. He entered the University of Leyden when twelve years old, and took his degree of Doctor of Laws at Orleans, France, at the age of fifteen. As a result of religious controversy, he was sentenced to imprisonment for life in 1610; but in 1621 he succeeded in escaping from prison and lived for ten years in Paris, where he composed and published his great work in 1623–1625. In 1634 he was appointed Swedish minister to France — a position which he held until the year of his death in 1645. Grotius was poet, philologist, philosopher, historian, and mathematician, as well as diplomatist, lawyer, and jurist.

[3] For references on the *jus naturale*, see Bibliography at the end of this chapter.

by an attractive style and a marvelous display of erudition or citation of authorities from men of all ages and countries (including the Bible, poets, orators, philosophers, and historians, as well as jurists) which went far to enhance his authority in the eyes of his contemporaries. He also borrowed largely from the Roman *jus gentium* the leading principles of which had been practically identified with the *jus naturale*. This "written reason," as the Roman Civil Law has been called, not only commanded the highest respect from its origin, but was sanctioned by general agreement, at least on the part of the educated classes; and Grotius thus relied upon positive law (*jus voluntarium*) as determined by general consent, as well as upon the Law of Nature, to give effect to the principles and usages of the Law of Nations.

58. **The Fundamental Principles underlying the Grotian System.** — Many of the principles laid down and usages sanctioned by Grotius are obsolete; others are found only in germ or are incompletely developed; many present-day laws and customs (as *e.g.* those making up the modern Law of Neutrality) were practically overlooked or received scant recognition from him: but the essential principles underlying the Grotian System remain the fundamental principles of International Law. Such are the doctrines of the legal equality and of territorial sovereignty or independence of States.[4]

These fundamental principles, though not clearly stated by Grotius, underlay his system and were fully developed by his successors, more especially by Wolff, Vattel, and G. F. de Martens. They were the inevitable outcome of the acceptance of the dogma of the supreme power or sovereignty of States and princes, as defined by Bodin, Grotius, Hobbes, and other political philosophers during the sixteenth and seventeenth centuries.[5]

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[4] The best recent estimates of Grotius' work are by Basdevant (in *Les fondateurs du droit int.*, ed. by Pillet); White, in *Seven Great Statesmen* (1910), 54–110; and Walker, *Science*, etc., ch. 4.

For a very full analysis of the *De jure belli ac pacis*, see Walker, *History*, §§ 143–148. The best modern translation is by Pradier-Fodéré (1867); it is preceded by a valuable biographical and historical essay.

[5] Though differing widely from the latter, both in point of view and details, Grotius (lib. I, c. 3, § 7) practically follows Bodin, who defines sovereignty as "supreme power over citizens and subjects, unrestrained by the laws." Dunning, *Political Theories from Luther to Montesq.*, pp. 96 and 181. Bodin's great work, *De*

It only remained to apply this dogma to the international relations of the Community of States recognized by the Peace of Westphalia. It was soon seen that, if States and princes are sovereign and independent, they must also be regarded as equal before the law; and that it was necessary to formulate a doctrine of the fundamental rights and duties of States.

59. **The Successors of Grotius.** — The successors of Grotius, who wrote during the seventeenth and eighteenth centuries, may be divided into three schools — the "Philosophical" or Pure Law of Nature School, the "Positivists" or Historical School, and the "Eclectics" or "Grotians."

60. **The Pure Law of Nature School.** — The Pure Law of Nature School, headed by Pufendorf (1632–1694), denied the existence of any positive International Law based on custom and treaties, and maintained that the Law of Nations is wholly a part of the Law of Nature.[6] Pufendorf occupied the first chair which was founded for the study of the Law of Nature and Nations at a university (at Heidelberg, Germany, in 1661), but his *magnum opus* on *De jure naturæ et gentium* was not published until 1672, when he held the position of Professor of Jurisprudence at the University of Lund, in Sweden. His great service was his insistence upon the supreme importance of natural law at a time when customary law based on good usages was insufficiently developed.[7]

Pufendorf's most famous disciple was Thomasius[8] (1655–1628), a German philosopher who published his *Fundamenta juris naturae et gentium* in 1705. Thomasius distinguished

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Republica, was first published in 1576. Grotius has been severely criticized for his defense of the patrimonial State and his repudiation of the doctrine of popular sovereignty; but these views doubtless served to recommend his opinions to the absolute monarchs of his day.

[6] *De jure naturæ et gentium*, II, ch. 3, § 22. On this point Pufendorf followed Hobbes (*De cive*, XIV, 4), who divided Natural Law into "a Natural Law of men and a Natural Law of States," and maintained that the two were composed of identical precepts. In other words, States live in a state of nature in respect to each other. But Hobbes and Pufendorf differed widely in their views as to the sociable nature of man. Pufendorf, however, adopted Hobbes' imperative view of the nature of law.

[7] The only part of his work which deals with International Law proper are the last five chapters of the eighth book.

[8] On Thomasius, see especially White, in *Seven Great Statesmen* (1910), 113–161.

between perfect and imperfect duties — a distinction afterwards elaborated by Wolff.[9] Other important "Naturalists" of the seventeenth and eighteenth centuries were: Barbeyrac (1674–1744), the famous French translator and commentator of the works of Grotius, Pufendorf, and others; the Genevan Burlamaqui (1694–1748), whose *Principes du droit naturel et politique* was published in 1747; Thomas Rutherford, who published his *Institutes of Natural Law* in 1754; and the French diplomatist De Rayneval (1736–1812), author of the *Institutions de droit de la nature et de gens.*[10]

61. **The Positive or Historical School.** — The Positive or Historical School of international jurists, while not denying the existence and validity of the Law of Nature, emphasized the importance of custom and treaties as sources of International Law. This school may be said to have originated in England, where it has also attained its fullest development. One of Grotius' predecessors, the Italian Gentilis, who was appointed Professor of Civil Law at Oxford in 1588, and whose chief work, *De jure belli*, was published in 1598, may in a sense be said to have been the founder of this school. At least he enriched his work with examples drawn from contemporary opinion and events — a practice which Grotius condemned — and he preferred historical investigation to abstract reasoning and systematic exposition.

Other representatives of this school in England during the seventeenth century were: the learned Selden[11] who, in a work entitled *Mare clausum* (published in 1635), attacked Grotius' views on the freedom of the sea as expressed in the latter's *Mare liberum* (published in 1609); Zouche (1590–1660), Professor of Civil Law at Oxford and Judge of the Admiralty Court, who published the first *manual* of International Law in 1650;[12] and Sir Leoline Jenkins, Zouche's successor as

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[9] Westlake, *Chapters*, p. 72.

[10] A belated pure "Naturalist" has even appeared during the latter half of the nineteenth century — the Scotch Professor Lorimer. He still defines the Law of Nations as the "law of nature realized in the relations of separate nations" or "political communities." See his *Institutes of the Law of Nations* (1883), I, pp. 1 and 19.

[11] In 1640 Selden also recognized the importance of a positive Law of Nations in a work on Law of Nature and Nations among the Hebrews.

[12] The influence of Zouche in England was very great. He was also the first pub-

Admiralty Judge, whose opinions on questions of prize law are of great importance in the history of International Maritime Law.[13]

The three leading positivists of the eighteenth century were the famous Dutch jurist Bynkershoek and the German Professors John Jacob Moser and G. F. de Martens.

Bynkershoek never wrote a treatise on International Law, but he still ranks as one of its leading authorities.[14] Although he recognizes reason as an important source of the Law of Nations, he relies mainly upon custom as expressed in treaties and international practice (including unilateral acts) for actual guidance.

John Jacob Moser (1701–1785) was the author of innumerable works bearing mainly on International Law,[15] which are perfect storehouses of historical facts and precedents. Moser was a thoroughgoing positivist, and his attitude toward the Law of Nature is one either of indifference or of contempt.

G. F. de Martens (1756–1821) also published numerous works dealing with positive International Law, the most important of which was entitled *Précis du droit des gens moderne de l'Europe*, published in 1788. This work, which appeared in

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licist to use the term *jus inter gentes* in the title of his work; but he was not the inventor of this phrase, as generally stated. Victoria (see note on p. 89, had employed it in the first half of the sixteenth century, and Grotius had made use of the phrase *jus inter civitates*, though the latter generally employed the ambiguous term *jus gentium*. This work of Zouche has been recently (1911) republished and translated under the auspices of the Carnegie Institution as Vols. I and II of *Classics of Int. Law*, edited by J. B. Scott.

[13] It should not be forgotten that Germany also produced several representatives of the positive or historical school during the seventeenth century. Of these the most important was Rachel, who published two dissertations on *De jure naturæ et gentium* in 1676.

[14] The fame of Bynkershoek rests upon three books: *De dominio maris* (1702); *De foro legatorum* (1721); *Questiones juris publici* (1737). Wheaton (*History*, p. 193) says that Bynkershoek was "the first writer who has entered into a critical and systematic exposition of the Law of Nations on the subject of maritime commerce between neutral and belligerent nations."

[15] Nys (1 *Droit int.*, p. 257) states that, in 1765, Moser had already composed 200 works and studies. His principal work, entitled *Versuch des neusten Europäischen Völkerrechts in Freidens und Kriegszeiten* in ten volumes, was completed in 1780. It is said by Wheaton (*History*, p. 323) to contain "a rich mine of materials." For a list of his principal works on International Law, see Wheaton, 324–325; and Rivier, in 1 Holtzendorff's *Handbuch*, § 102.

successive editions and has been translated into many languages,[16] has exercised a great influence upon international practice and the subsequent development of International Law. Martens does not wholly repudiate the Law of Nature, based on reason and utility, but he admits it only in default of positive rules founded on usage and treaties. As the first systematic manual on positive International Law more or less adapted to modern needs, it became a model and still enjoys considerable reputation. G. F. de Martens is especially clear in his exposition of the fundamental rights and duties of States.[17]

62. **The "Eclectics" or "Grotians."** — A third school of international jurists — the "Eclectics" or "Grotians" — occupy a middle ground between the "Naturalists" and "Positivists." The members of this school followed in the footsteps of Grotius in preserving the distinction between the Law of Nature and the positive or voluntary Law of Nations, based on custom or consent; but, unlike their master, they have treated both as about equally important.

The greatest representatives of this school in the eighteenth century were the German philosopher Wolff (1679–1754) and his Swiss disciple Vattel (1714–1767).

Wolff's greatest work in this field was a treatise on the *jus naturæ* (1740–1748) in eight parts. To this was added a volume on the *jus gentium* in 1749 and an abridgment of the whole entitled *Institutiones juris naturæ et gentium* in 1763. But Wolff's highly abstract and mathematical treatment of these subjects rendered his works practically unintelligible to those who might otherwise have profited by them.

The task of introducing Wolff's ideas to men of letters, statesmen, and diplomatists was undertaken by Vattel, the famous Swiss publicist, whose influence on the conduct of international relations is perhaps second only to that of Grotius. Vattel tells us in the preface of his *Law of Nations*[18] that he had at first intended only to "clothe" certain portions of Wolff's system "in a more agreeable dress," but he soon found it necessary to compose a very different work. He, therefore, contented himself with "selecting from the work of M. Wolfius the best parts, especially the definitions and general principles." His book, though by no means an original contribution to the subject, is indeed far from being the mere abridgment or paraphrase of Wolff's treatise on the *jus gentium* that it is often represented. He accepts Wolff's doctrine of perfect and imperfect obligations, and emphasizes the fundamental rights and duties of States. He also adopts his master's complicated and impractical division of positive International Law into the voluntary, customary, and conventional Law of Nations;[19] but he rejects the Wolffian fiction of a World State or *civitas maxima* as a foundation for the voluntary law of nations. Vattel wrote in an attractive style and enriched his work with illustrations drawn from the history of his own times.[20]

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[16] An English translation by Cobbett was published at Philadelphia in 1795. The best and most recent edition, with notes by Pinheiro-Ferreira and Vergé, appeared at Paris in 1864. De Martens also began the celebrated collection of treaties which bears his name and which has been continued up to our own time. G. F. de Martens must not be confused with his nephew Charles de Martens, the author of the *Causes célèbres de droit des gens* (1827) and the *Guide diplomatique* (1832), or with the famous Russian jurist and publicist F. de Martens of our own day.

[17] See his *Précis*, liv. IV.

63. **The Period between 1648–1713.** — The period between 1648 and the Peace of Utrecht (1713) was marked by the aggressive policy of Louis XIV, resulting in a series of wars and conquests and a disturbance of the balance of power in Europe created by the Peace of Westphalia. This in turn led to the

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[18] This famous work, which was published in 1758, bears the additional title: "Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns." It has had many editions and translations. The most complete and recent edition, with notes *variorum*, is that edited by Pradier-Fodéré in 1863.

[19] In addition to these three classes of positive law, we have of course in the Wolffian as in the Grotian system the natural or necessary law which Vattel (Preliminaries, §§ 6–8) says, "consists in the application of the law of nature to nations."

[20] Though not members of any particular school, the following eighteenth century publicists should receive special mention because of their influence upon the development of maritime law, more especially in connection with the Law of Neutrality: the Danish minister Hübner, whose important treatise entitled *De la saisie des bâtiments neutres* (Seizure of Neutral Vessels) was published in 1759; the French jurist Valin, whose excellent Commentary upon the *Marine Ordinance of 1681* and *Traité des prises* (Treatise on Prizes) appeared during 1760–1763; Heineccius, who wrote his treatise *De navibus* in 1721 and *Elementa juris naturalis* which was translated into English in 1763; and the Italians Lampredi and Galiani, who engaged in a famous controversy on the principles of the Armed Neutrality in the latter part of the eighteenth century. On these authors and this controversy, see Wheaton, *History*, especially pp. 200, 219–229, and 309–322.

formation of the first great European coalition against France headed by England in 1688 — a date which also marks the beginning of what Seeley [21] calls the "Second Hundred Years' War" between England and France (1688–1815), which resulted in the conquest of the major portion of the French colonies by England and the establishment of the maritime supremacy of Great Britain. The war of the Spanish Succession (1701–1713) ended in the restoration and first formal acknowledgment of the balance of power as a fundamental principle of European policy.

During this period (1648–1713) lip service was rendered to the leading principles and usages of the Law of Nature and Nations laid down by Grotius and his successors, but its rules were often practically ignored. The rights and immunities of legations were generally recognized and became fully established; the doctrine of the freedom of the seas made considerable progress; and fixed rules were laid down regulating such matters as the right of visit and search, blockade, and the capture of contraband. In respect to the law of maritime capture a long backward step was taken.

The famous French Marine Ordinance of 1681 [22] admitted the maxim of the *Consolato del Mare* that enemy goods in a friend's vessel are good prize; but it denied the rule that the goods of a friend found on an enemy ship are free. It even declared that neutral vessels carrying enemy goods are liable to confiscation, thus limiting the lawful commerce of a neutral to his own goods carried in his own vessel.[23] With the exception of the latter

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[21] *Expansion of England*, Lect. II, pp. 24 and 29. There was, however, a long period of peace, and even of alliance, between England and France during 1713–1740.

[22] This ordinance was modeled on earlier ones. The law of France varied at different times. On the *Marine Ordinance of 1681* and the maritime law of this period, see especially Wheaton, *History*, 107–161.

[23] Wheaton, p. 111. "Valin states that this jurisprudence, which prevailed in the French prize courts from 1681 to 1744, was peculiar to them and to the Spanish Courts of Admiralty, the usage of other nations being to confiscate the goods of the enemy only." *Ibid.*, p. 114.

Bynkershoek (*Questiones juris publici*, lib. I, cap. 14) denies that the neutral ship carrying enemy goods might be condemned, but he admits that the goods are subject to confiscation. He also agrees with Grotius (*De jure belli ac pacis*, lib. III, cap. 6) that the rule that "goods found in enemies' ships are to be treated as enemies' goods ought not be accepted as a settled rule of the Law of Nations, but as rule, the principles laid down by the Marine Ordinance of Louis XIV may be said to have entered largely into the theory and international practice (both customary and conventional) of Europe during the seventeenth and eighteenth centuries.[24]

64. **The Eighteenth Century.** — The most important events in the international relations of the eighteenth century were: the admission of Russia under Peter the Great to full membership in the circle of European States; the rise of Prussia under Frederick the Great as a first-rate Power; the declaration and achievement of American independence; and the outbreak of the French Revolution.

The colonization of America by the leading nations of Europe, which was begun on a large and effective scale during the seventeenth and continued during the eighteenth century, gave rise to new questions to which the Roman law of *occupatio* and *alluvium* was applied. In Europe the main issues were

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indicating a certain presumption which may be rebutted by valid proof to the contrary." Grotius adds: "And so it was judged in full senate by our Hollanders in 1338, when war was raging with the Hansa towns; and the judgment has become law." Some eighteenth century publicists like Hübner and G. F. de Martens declared that both neutral goods on enemies' ships and enemy goods on neutral ships were free; but their views were not generally accepted either in theory or practice.

[24] It is extremely difficult to say what the law was either in general or at any particular time and place. The rules of the *Consolato* seem to have prevailed quite generally during the period extending from the thirteenth to the middle of the sixteenth centuries, when France adopted harsher rules. About the middle of the seventeenth century, the Dutch began to secure the insertion of the rule of "free ships, free goods" into treaties, conceding in return the confiscation of neutral goods in belligerent vessels (enemy ships, enemy goods). This latter principle was regarded as a corollary of the former, thus reversing the maxims of the *Consolato del Mare*. Even England, which became the champion of the double doctrine of the *Consolato*, yielded these rules in a number of treaties. The United States, while advocating the adoption of the principle of "free ships, free goods" and incorporating it into most of their treaties, followed English precedents in their interpretation of the customary law, thus recognizing the right of capture of enemy goods in neutral vessels. On the other hand our Government and Courts have always maintained that the goods of the neutral found in the vessel of an enemy are free. The leading case is that of *The Nereide* (1815), 9 Cranch, 388, especially p. 418.

On this subject, which has become a mere matter of historical interest since the Declaration of Paris in 1856, see De Boeck, *De la propriété ennemie sous pavillon ennemie* (1882); Bonfils (Fauchille), Nos. 1497–1526; Dupuis, *Le droit de la guerre maritime* (1899), ch. 2; Hall, Pt. IV, chs. 7 and 9; 2 Halleck (Baker's 3d ed.), 279–286; 2 Hautefeuille, *De droit des neutres*, Titre X; Kleen, *De la neutralité*, I, Introduction-historique, and II, 92–215; Lawrence, Pt. IV, ch. 4; Manning, Bk. V, ch. 6; 3 Phillimore, Pt. IX, ch. 10; 2 Ortolan, *Dip. de la mer*, liv. III, ch. 5; Rivier, 429–430; Taylor, Pt. V, ch. 2; 2 Twiss, ch. 5; and 2 Westlake, 125–128.

dynastic, economic, and territorial, and the principle of the balance of power based on an equilibrium of forces was repeatedly affirmed and violated. The diplomacy of this period was dominated by Machiavellian aims and methods.[25] The end was the glory and aggrandizement of dynasties and States; and to attain these ends all means seemed good. Treaties were violated whenever the interests of the State (*raison d'État*) appeared to demand it, and wars were undertaken on the slightest pretexts. Frederick the Great suddenly invaded Silesia upon the death of Charles VI, in 1740, within a few years after having written his *Anti-Machiavel;* and of all the States which had guaranteed the Pragmatic Sanction of the Emperor, England alone (and she acted from motives of self-interest) kept faith with Austria upon the accession of Maria Theresa after the death of her father. But the greatest crime committed by the Machiavellian statesmen of the eighteenth century was the extinction of one of the most important members of the European family of nations — the threefold division of Poland in 1772, 1793, and 1795.[26]

65. **The Armed Neutrality of 1780.** — Early in 1780 the Russian Government laid down the following rules, which were primarily directed against the maritime pretensions of England: (1) all neutral vessels may freely navigate from port to port;[27] (2) the goods belonging to the subjects of the Powers

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[25] On the Machiavellian character of the eighteenth-century diplomacy, see especially Sorel, *L'Europe et la révolution française*, I, particularly ch. I.

[26] The first division of Poland has been characterized by Wheaton (*History*, p. 267) as the "most flagrant violation of natural justice and International Law which has occurred since Europe first emerged from barbarism." Sorel (*op. cit.*, p. 89) remarks, "Two episodes summarized the custom of Europe on the eve of the French Revolution: the war of the Austrian Succession and the division of Poland." He calls these the "testament of old Europe," and declares that after this had been signed she could only die, leaving as a legacy the pernicious tradition of the abuses from which she perished.

[27] This is a denial of the famous Rule of 1756 which forbade neutrals to engage in the coasting trade of a belligerent, or in trade between a belligerent and its colonies, when such trade is not permitted during peace. The rule is now practically obsolete; whether it was ever good law is doubtful. The principle had been applied to the coasting trade before 1756, and was extended to the colonial trade during the Seven Years' and the Revolutionary wars. The great champion of the Rule was England. The leading case is that of *The Immanuel*, 2 Rob. Rep. 186. On the *Rule of 1756*, see especially Hall, § 234; 2 Kleen, § 175; Manning, Bk. V, ch. 5; 7 Moore, *Digest*, 1180; 3 Phillimore, Pt. IX, ch. 11; and Wheaton, *History*, 217–219.

at war shall be free in neutral vessels, except contraband articles;[28] (3) such contraband articles shall be restricted to munitions of war; (4) the denomination of blockaded port shall only be given to a port "where there is, by the arrangements of the power which attacks it with vessels, stationed sufficiently near, an evident danger in attempting to enter it."[29] These principles were approved by France, Spain, the United States, and Austria, and were incorporated into the conventions of the League of Armed Neutrality of 1780, which was formed by Denmark and Russia and soon joined by Sweden, Holland, Prussia, Portugal, and the king of the Two Sicilies. In 1800 these principles were affirmed anew, with some modifications and additions,[30] by the Second League of Armed Neutrality, consisting of Russia, Prussia, Sweden, and Denmark.

66. **The French Revolution.** — The outbreak of the French Revolution, and the successful inauguration of the American Union based on principles of democracy, nationality, and federalism, mark a new epoch in the history of international relations, as of civilization in general.

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[28] See *supra*, note 24. This principle of "free ships, free goods" had also been asserted in 1752 by the Prussian commissioners who reported to Frederick the Great on the celebrated Silesian Loan Controversy. See Ch. de Martens, 2 *Causes célèbres*, Cause première. For a good summary of this controversy between Great Britain and Prussia, see Wheaton, *History*, 206–217.

[29] Wheaton, *History*, 297–298. Upon the *Armed Neutrality of 1780*, see especially Bergbohm, *Die bewaffnete Neutralität* (1884); De Boeck, *De la propriété privée ennemi*, 55 ff.; Fauchille, *La diplomatie française et la ligue des neutres de 1780* (1893); Manning, Bk. V, ch. 6, 325; 3 Phillimore, clxxxvi ff.; Wheaton, *History*, 295 ff.

[30] The main additional article adopted by the Second Armed Neutrality of 1800 affirmed that the "declaration of the officers, commanding the public ships which shall accompany the convoy of one or more merchant vessels, that the ships of his convoy have no contraband articles on board, shall be deemed sufficient to prevent any search on the convoying vessels or those under convoy." Wheaton, *History*, p. 399. It will be seen that several of the principles of the Armed Neutrality Leagues are still in advance of International Law. They were, of course, far in advance of the times in which they were formulated. Though soon violated by some of the very nations which declared them, they do not deserve the cavalier treatment which they receive at the hands of several English publicists. As Lawrence (*Principles*, 3d ed., p. 104) points out, "the controversies attending the formation, progress, and dissolution of the two great leagues known as the Armed Neutralities of 1780 and 1800, did almost as much to clear up the question of neutral rights as the Alabama Controversy and the action of Washington in his second administration did to clear up the question of neutral duties."

The Abbé de Saint-Pierre had presented the world with his "Project of Perpetual Peace" in 1713. Montesquieu taught that the Law of Nations is naturally based upon the principle that the various nations should do each other as much good as possible in times of peace; in war as little harm as possible without injuring their true interests. Rousseau affirmed that war is not a relation between individuals but a relation between States. Mably, the author of an important work entitled *Droit public de l'Europe fondé sur les traités* (The Public Law based on Treaties, 1748), advocated love for justice and humanity, respect for treaties, and the immunity of private property in maritime warfare.

The National Assembly of France solemnly declared on May 22, 1790, that "the French nation renounces wars of conquest and will never use force against the liberty of any people."[31] But on November 19, 1792, the National Convention, abandoning the early principles of the Revolution, issued its famous decree that France "will grant fraternity and aid to all peoples who may wish to recover their liberty,"[32] a decree which was, however, abrogated on April 14, 1793, and supplanted by one declaring in favor of non-intervention. The Jacobins incorporated the principle of non-intervention in their still-born Constitution of 1793.[33] On June 18, 1793, Abbé Gregoire presented a "Project for a Declaration of the Law of Nations" in twenty-one articles,[34] as a pendant to the Declaration of the

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[31] 2 Sorel, *L'Europe et la rév. française*, p. 89. This decree became part of tit. VI of the Constitution of 1791. See Anderson, *Constitutions and Documents*, 93, and Helie, *Les constitutions*, 293.

[32] 3 Sorel, *op. cit.*, 170. This decree was supplemented by that of December 15, 1792, proclaiming liberty and sovereignty to all peoples. See Anderson, *op. cit.*, No. 28, pp. 130–132.

[33] "The French people declares itself the friend and natural ally of free peoples; it does not interfere in the governments of other nations; it does not allow other nations to interfere in its own." Arts. 118–119 of the Const. of 1793; Anderson, No. 39, p. 183.

[34] The more important of these articles are as follows:

ART. 2. The peoples are independent and sovereign.

ART. 3. A people should do to others as it would have them do to it.

ART. 4. The peoples should do each other as much good as possible in times of peace; in war, the least harm possible.

ART. 5. The particular interest of a people is subordinate to the general interest of the human family.

ART. 6. Every people has a right to organize and change its government.

ART. 7. A people has not the right to intervene in the government of others.

Rights of Man of 1789. It contained few principles which are unsound. Some of them form part and parcel of the fundamental rights of States; others belong to the International Law of the future; only a few are impracticable. This Project, which has been characterized as Utopian, was rejected by the Convention; but it may nevertheless be regarded as expressing the altruistic and idealistic spirit of the French Revolution in its attitude toward foreign nations. As in the case of the Declaration of the Rights of Man, its great defect was that it contained no Declaration of *Duties*.

67. **The Revolutionary and Napoleonic Era.** — Like historical Christianity, the French Revolution proved false to its principles, and France entered upon a career of aggression and conquest which culminated in the short-lived Napoleonic Empire (1804–1814), embracing the greater part of central and southern Europe. As in the case of the aggressions of Louis XIV, Great Britain headed a series of coalitions against Napoleon I which ended in his downfall and the reduction of France to her former boundaries. During the period of the gigantic Revolutionary and Napoleonic struggles (1792–1815), fundamental principles and customs of International Law, more especially of maritime law, were set at naught by both France and England, and the rights of neutral commerce were violated in the most outrageous manner. Napoleon, through his Berlin and Milan decrees of 1806 and 1807, not only declared the whole British Isles to be in a state of blockade and interdicted all commerce and correspondence with them, but ordered that all vessels sailing to or from any port in the United Kingdom or its colonies should be confiscated.[35]

ART. 10. Each people is master of its territory.

ART. 15. An enterprise against the liberty of one people is a criminal attempt against all the others.

ART. 21. Treaties between the peoples are sacred and inviolable.

For the full text of this remarkable declaration, see Nys, *La révolution française et le droit int.* in *Études*, II, 395–396; and 1 Rivier, 40–41.

[35] The Continental System of Napoleon was only a continuation of a policy begun under the First French Republic. "Already in 1793 England and Russia interdicted all navigation with the ports of France, with the intention to subdue her by famine. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to the ports of the enemy or carrying enemy goods." 1 Oppenheim, § 46. For details, see Mahan, *Influence of Sea Power upon the French Revolution and Empire*, II, ch. 17; and Wheaton, *History*, 372 ff.

On Napoleon's *Continental System*, see Manning, *Law of Nations*, Bk. V, ch. 10;

The British Orders in Council declared all French ports, together with those of her allies, to be in a state of blockade, and ordered the confiscation of any neutral vessel carrying "certificates of origin" — a device for distinguishing between British and neutral goods. These measures taken together threatened the destruction of all neutral commerce. They called forth the protest and opposition of the United States, which became the main champion of neutral rights and duties at the beginning of Washington's administration in 1793 — a position which she has since, on the whole, maintained.[36]

Though a period of conquest, violence, and reaction, it must not be forgotten that the French under Napoleon virtually destroyed old feudalistic and absolute Europe, and sowed the seeds of democracy and nationality, which eventually bore fruit[37] in a new and in part rejuvenated and regenerated Europe.

68. **The Congress of Vienna.** — The balance of power in Europe was once more restored at the reactionary Congress of Vienna in 1814–1815.[38] Though largely basing its work upon the principles of legitimacy[39] and ignoring the powerful forces of democracy and nationality, this Congress nevertheless established a new political order in Europe and settled some important questions of International Law. It defined the relations of ministers, en-

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and the vast Napoleonic literature, especially Fournier, Rose, Sloane, Lanfrey, etc. Perhaps the best accounts are those by Mahan, *op. cit.*, ch. 18; and Henry Adams, *History of the U. S., passim,* particularly Vol. IV, ch. 4.

For the documents bearing upon the System, see Anderson, *Constitutions and Documents*, No. 77; and the University of Pa. *Trans. and Reprints*, Vol. II, No. 2, 17–26.

[36] For good accounts of the efforts of the United States to maintain and enforce neutrality during the Revolutionary and Napoleonic period, see Wheaton, *Int. Law* (Dana's ed.), note 215; Moore, *Am. Diplomacy*, chs. 2 and 3; Henry Adams, *History of the U. S., passim.*

[37] Especially fruitful were the Secularization and Mediation Acts, which reduced the number of German States to thirty-nine, and prepared the way for Bismarck's work of unification and reorganization in Germany.

[38] On the *Congress of Vienna*, see especially Debidour, *Histoire diplomatique de l'Europe*, ch. 11; 2 Fyffe, *History of Modern Europe*, ch. 1; Rose, *Revolutionary and Napoleonic Era*, ch. 11; Seignobos, *Histoire politique de l'Europe contemporaine*, (Eng. trans. 1899), ch. 1; Stephens, *Revolutionary Europe*, ch. 11; Wheaton, *History*, 424–506. See also Hazen, *Europe since 1815*, ch. 1 and pp. 738–739 for select bibliography.

[39] But this principle was not thoroughly and consistently applied, *e.g.* in Sweden and Germany.

voys, and ambassadors; declared in favor of the abolition of the African slave trade; and agreed upon general principles intended to secure freedom of navigation on great international rivers, at least by co-riparian States.

Among the political acts of the Congress of Vienna should be particularly noted: the union of Norway and Sweden and of Belgium and Holland; the reorganization and neutralization of Switzerland; the reorganization of the new Germany of thirty-nine States into a loose Confederacy; and, in general, the restoration of the old dynasties in France, Spain, Italy, and Germany.[40]

69. **The Period of Reaction (1815–1848).** — Under the deadening influence of the Metternich System,[41] the reaction continued for a generation (1815–1848) after the close of the Congress of Vienna. Yet there was progress even during this oppressive régime.

70. **The Holy Alliance.** — In 1815 the Emperors of Russia and Austria and the King of Prussia formed what is generally known as the Holy Alliance,[42] pledging themselves to apply the precepts of Christianity, viz. fraternity, justice, charity, and peace, to the conduct of international as well as internal affairs. But much more important than this paper alliance, based on mere sentiment and vague aspirations possibly cloaking ulterior designs, was the renewal of the Quadruple Alliance the same year between Russia, Austria, Prussia, and England. In Article 6 it was decided "to hold periodical meetings consecrated to great common objects, and to concert measures for the repose and prosperity of the peoples."[43]

71. **The Concert of Europe.** — This alliance marks the beginning of the European Concert which undertook to suppress revolutions, maintain the treaties of Paris and Vienna, and regulate the affairs of Europe generally. It marks an attempt to substitute for the old European States-system or community of nations a new society or Confederacy which should be under the control or

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[40] The main lines of this resettlement of Europe were laid down by the allies in the treaty of Chaumont of March 1, 1814.

[41] On "Europe under the Metternich System," see especially Seignobos, *Pol. History of Europe*, ch. 25; and Hazen (see index and bibliographies).

[42] For the text of the *Holy Alliance*, see the University of Pa. *Trans. and Reprints*, Vol. I, No. 3, p. 940. For a good summary, see Hazen, 14–16.

[43] Phillips, *Modern Europe*, p. 19; or Hazen, 16 ff.

dictatorship of a committee of the Great Powers. In 1818 it was joined by France and became known as the Pentarchy, but a rift in the alliance soon showed itself when England and France refused to sign the Troppau Protocol of 1820.[44] England withdrew altogether at Verona in 1822. At Aix-la-Chapelle (1818), the Powers declared for the first time that it was their " unalterable determination never to swerve from the strictest observance of the principles of the Law of Nations, either in their relations with one another or with other States." [45] In pursuance of their policy of intervention — a principle to which England never assented — they held a series of Congresses (1818–1822) [46] which authorized interventions in Naples, Piedmont, and Spain.

72. **The Monroe Doctrine.** — When, however, it was proposed to extend this system to the Spanish colonies in America which had achieved their independence, the President of the United States, acting upon a hint from the great British statesman Canning, interposed and promulgated the famous Monroe Doctrine, in his annual message to Congress of Dec. 2, 1823. He declared that " we should consider any attempt on their part (*i.e.* of the Allied Powers) to extend their system to any portion of this hemisphere as dangerous to our peace and safety." He added: —

" With the existing colonies or dependencies of any European Power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European Power in any other light than as the manifestation of an unfriendly disposition toward the United States."[47]

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[44] The Protocol of Troppau was an extension to Europe of the reactionary Carlsbad Decrees which had struck such a severe blow at freedom in Germany. It declared that the "States which had undergone a change of government due to revolution, the results of which threaten other States, *ipso facto*, cease to be members of the European Alliance, and remain excluded from it until their situation gives guaranties for legal order and stability."

For the text of the *Carlsbad Decrees* and *Troppau Protocol*, see Univ. of Pa. *Trans. and Reprints*, Vol. I, No. 3, pp. 16–24. For good accounts see Phillips, *Modern Europe*, pp. 73 and 96; and Hazen, 59–60.

[45] For the text of this declaration, see Nys on "Le Concert European," in 2 *Études*, p. 27.

[46] It is to the work of these Congresses and the System represented by them that the term "Holy Alliance" has been usually applied.

The promulgation of the Monroe Doctrine, which was followed by the recognition of the independence of the Latin-American States by England, definitely added to the society of nations the leading States of South America and Mexico.[48]

The system and principles of the so-called "Holy Alliance" were finally overthrown by the Revolutions of 1830 and 1848 which, although followed by a period of reaction, eventually substituted the principles of nationality, democracy, and constitutional rule for those of legitimacy and absolutism.

73. **The Declaration of Paris of 1856.** — The next important step in the development of International Law was taken at the close of the Crimean War in 1856.[49] Not only was Turkey expressly admitted to theoretical full standing as a member of the Society of Nations, but the Congress of Paris issued the following epoch-making Declaration of leading principles of Maritime International Law: —

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[47] 2 Richardson, *Messages and Papers of the Presidents*, 218.

In another part of this same message (p. 209), Monroe also declared that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Powers." This part of the message was directed primarily against the encroachments of Russia in the Northwest.

Perhaps the best and most inclusive statement of the American policy is contained in a letter by Jefferson to Monroe, dated October 24, 1823; "Our first maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle in cis-Atlantic affairs."

On the *Monroe Doctrine*, see * Dana's note 36 to Wheaton's *Int. Law;* * Chadwick, *The Diplomatic Relations of the U. S. with Spain*, ch. 10; Beaumarchais, *La doctrine de Monroe* (1898); * Coolidge, *The U. S. as a World Power*, ch. 5; Edginton, *The Monroe Doctrine* (1904); * Henderson, in *American Diplomatic Questions* (1901), Pt. IV; Moore, in *American Diplomacy*, ch. 6; *6 Moore's *Digest*, ch. 20; Petin, *Les États Unis et la doctrine de Monroe* (1900); Redaway, *The Monroe Doctrine* (1898); Snow, *Am. Diplomacy*, Pt. II. A good appreciation of the Monroe Doctrine is contained in Moulin's excellent work on *La doctrine de Drago* (1909).

[48] Their recognition by the United States took place in the spring of 1822; by England early in 1825. See Paxson, *The Independence of the South American Republics* (1903).

[49] The Declaration of Paris was signed on April 16, 1856, by all the Powers represented at the Congress, viz. England, France, Austria, Russia, Sardinia, Turkey, and Prussia. The States not represented at the Congress were invited to sign, and most of them did so before the end of the year. Japan signed in 1886. The United States, Spain, Mexico, and a few minor States held out, but all have in practice observed the rules of the Declaration. Spain gave notice of her adhesion at the

(1) Privateering is and remains abolished.
(2) The neutral flag covers enemy's goods, with the exception of contraband of war.
(3) Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
(4) Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy.

74. **The Period since 1856.** — The half century beginning with the Declaration of Paris in 1856 and ending with the London Conference in 1909 has seen greater progress in the direction of internationalism and more successful attempts to improve and codify International Law than any other in history, and possibly more than all previous half centuries combined. It has been a period of Congresses and Conferences,[50] of International Unions and Associations with definite organs in the shape of Commissions and Bureaus which are rapidly developing a sort of international legislation and an International Administrative Law.

Although the principle of nationality won its greatest triumphs during this period in the achievement of Italian and German Unity (1859-1870), it seems that the spirit of nationality is being modified or supplemented by that of internationalism, and that the older conceptions of sovereignty and independence are yielding to ideals of interdependence.

75. **Codification of the Law of Nations.** — The first important step towards the codification of the laws of land warfare was taken in 1863 when our Government published the "Instructions for the Government of Armies of the United States in the Field," prepared by Dr. Francis Lieber.[51] In 1864 there was concluded,

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Hague Conference of 1907. The objection of the United States was based upon the idea that, inasmuch as we did not possess a large navy, the right to fit out privateers must be retained until the capture of private enemy property at sea is abolished. Inasmuch as this condition no longer holds and all the Maritime Powers have observed the rules laid down by the Declaration of Paris for at least fifty years, there is no longer any reason for denying or doubting their validity as International Law.

On the *Declaration of Paris*, see especially Higgins, *The Hague Peace Conferences* (1909), 1-4.

[50] All real distinction between the words Congress and Conference, if such ever existed, seems to have been lost.

[51] The "Instructions" are printed as an Appendix in Scott's *Texts of the Hague Conferences;* and as Appendix II in Wilson's *International Law.*

on the initiative of Switzerland, the "Geneva Convention for the Amelioration of the Condition of the Wounded in War."[52] This Convention, which provided for neutralization of persons and things connected with the care of the sick and wounded, was signed by nearly all civilized Powers. By the Declaration of St. Petersburg of 1868 many States renounced, in case of war among themselves, the use of any "projectile of less weight than 400 grammes (about 14 ounces) which is explosive, or is charged with fulminating or inflammable substances."[53]

76. **The London Conference of 1871.** — In 1871, the Conference of London[54] solemnly proclaimed "that it is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable agreement." But it is very doubtful whether, stated in this absolute form, the above declaration is a principle of International Law.

77. **The Brussels Conferences of 1874.** — In 1874 the Brussels Conference[55] presented the world with a Code of Land Warfare

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[52] For the text of the *Geneva Convention* (including the *Additional Articles* of 1868) see Higgins, *The Hague Peace Conferences*, 8–17; Whittuck, *Int. Doc.*, 3–9; or Supplement to 1 *A. J.* (1907), 90–95. But the *Additional Articles* failed of ratification. The Convention resulted from an agitation aroused by the indefatigable labors of M. Moynier and the publication of a book entitled *Un souvenir de Solferino* by M. Dunant, a Swiss philanthropist who had witnessed the terrible sufferings of the wounded in that battle (1859).

[53] This was based on the principle that the only legitimate object of war "is to weaken the military force of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." See preamble of the *Declaration*, in Higgins, 6; or Whittuck, 10.

[54] This Conference was attended by representatives of the same Powers which had signed the Treaty of Paris of 1856 — an agreement which Russia had violated by reëstablishing her maritime arsenal on the Black Sea upon the outbreak of the Franco-German War of 1870.

[55] For the text of the *Code of the Brussels Conference*, see Higgins, 273–280; Wilson and Tucker, *Int. Law*, 384–394 (Appendix III); Supplement to 1 *A. J.* (1907), 96–103; or Scott, *Texts of the Two Hague Conferences*.

The Brussels Conference was attended by delegates from 15 European States. Owing to a misunderstanding, the United States was not represented. The Latin-American States were not invited, and several delegates from South American States were refused admission. See Nys in 2 *Études*, 39–40. On the *Brussels Conference*, see especially Holland, *Studies*, 59–78; and F. de Martens, *La paix et la guerre* (1901), 73–132.

which, though it failed of ratification, obtained great authority and was generally observed. It was largely based on the American "Instructions" and became in its turn the model for the Hague Code of 1899.

78. **The West African Conference.** — The next important Conference was the West African Conference, which met in 1884–1885 to decide certain questions concerning the Congo Free State, whose independence it recognized. This Conference, at which the United States was represented, stipulated for freedom of trade and travel within the Congo basin; agreed to "strive for the suppression of slavery, and especially of the negro slave trade;"[56] engaged to respect the neutrality of the Congo territories; and the Signatory Powers obligated themselves to preserve reasonable order in the territories occupied by them, as also to notify one another of any future occupations or the establishment of future protectorates on the coast of the African continent.

79. **International Unions and Congresses.** — The period since 1850 has also been characterized by a remarkable number and variety of International Unions and Conferences,[57] both public and private, dealing with economic, social, and sanitary matters. Beginning with the first International Sanitary Conference held at Paris in 1851,[58] we have a long succession of official International

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[56] Art. 6 of the "General Act of the Conference of Berlin Concerning the Congo," which is printed in the Supplement to 3 *A. J.* (1909), No. 1, pp. 7–25. This Act was signed by the leading maritime Powers, the United States, and a number of the minor European States (including Turkey) — 14 in all.

It was afterwards supplemented by the Conference of Brussels of 1890, attended by 17 States (including the additional States of Persia, Zanzibar and the Congo), which agreed upon a "General Act for the Repression of the African Slave Trade and the Restriction of the Importation into, and Sale in, a certain defined zone of the African Continent of Firearms, Ammunition, and Spirituous Liquors." For the text of this Act of 100 Articles, see Supplement, *op. cit.*, 29–59.

On the "Origin of the Congo Free State," see an interesting article by Jesse S. Reeves in 3 *A. J.* (1909), 99–118.

[57] For a list of 116 such Congresses or Conferences of an official character since 1850, compiled by the Hon. S. E. Baldwin, see 1 *A. J.*, 808–817. It is followed by a list (pp. 818–829) of nearly 200 International Congresses, Conferences, or Associations, composed of private individuals. These lists must be far from complete, for there are said to have been over 160 International Congresses during the year 1907 alone.

[58] At this Conference twelve Powers were represented. There have been many subsequent International Sanitary Conferences. "In the one field of sanitation and medicine there are at least twenty separate international organizations." Reinsch, in N. Y. *Independent* for May 13, 1909.

Congresses dealing with all sorts of subjects, such as statistics, sugar duties, weights and measures, monetary matters, international postal and telegraphic correspondence, navigation of rivers, the metric system, submarine cables, private international law, protection of industrial property, railroad transportation, commercial law, international copyright, regulation or suppression of the liquor traffic in certain places, customs duties, promotion of the interests of the working classes, abolition of the slave trade, protection of labor in mines and factories, international arbitration, fisheries, repression of epidemic diseases, international telephony, suppression of the "white slave" traffic, international wireless telegraphy, agriculture, etc.[59]

The most important of these are perhaps the Conference on Telegraphic Correspondence which met at Paris in 1865 and formed the Universal Telegraph Union; the Universal Postal Union founded in 1874; the European Union of Railway Freight Transportation (1890); the Union for the Protection of Industrial Property, *i.e.* patents, trade-marks, etc., created in 1883; the Hague Union of 1886 for the Protection of Works of Art and Literature; the four Hague Conferences (between 1893 and 1904) on Private International Law; and the four Pan-American Congresses which have been held since 1890.

Many of these Unions[60] are endowed with permanent organs of legislation and administration. Their legislative organ may be said to be the Conference or Congress where unanimity is the general rule, but to which there are exceptions. The administrative organs are Commissions and Bureaus.[61] One result of the activities of these various organs will doubtless be the development of the science of International Administrative Law — a branch of international jurisprudence which is still in its infancy.

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[59] In addition to the lists referred to above, see the articles on "Int. Conferences" and "Int. Unions" by Judge Baldwin and Professor Reinsch in 1 *A. J.* (1907), pp. 569-623; and Reinsch, *Public Int. Unions* (1911). For general references see pp. 582 and 602; and Bonfils (Fauchille), note, pp. 496-497. The main authorities are Descamps, *Les offices internationaux* (1894); Moynier, *Les bureaux internationaux* (1892); Van Overbergh, *L'association int.* (1907); Poinsard, *Droit int. conventional* (1894); *Ibid., Les unions et ententes internationales* (2d ed., 1901), *Ibid., Le droit int. au XXe siècle* (1907); Meili, *Die internationalen Unionen* (1885–1889); and B. von Toll, *Die int. Bureaux* (1910).

Very few writers on International Law devote much space to this subject. Exceptions are Bonfils (Fauchille), Nos. 914–928; 2 Mérignhac, *Traité*, 688–732; Liszt (3d ed.), §§ 16–17, 28–30, 33-36; 2 Nys, *Le droit int.*, sec. VIII, ch. 8; 1 Oppenheim, §§ 458–471, 578–591; and Ullmann (2d ed.), § 58. The Russian F. de Martens, *Traité*, devotes two whole volumes (II and III) to what he calls "International Administration"; but his whole system is erroneous. He classifies the right of embassy, Private International Law, and war and neutrality under this head.

[60] There are said to be over thirty public or official International Unions.

80. **International Arbitration.** — The practice of international arbitration, which had greatly declined at the close of the Middle Ages and which had almost disappeared from international usage during the seventeenth and eighteenth centuries,[62] may be said to have been revived by the Jay treaty of 1794 between England and the United States, which provided for the reference of several questions to arbitration. But it was not until the smoke had cleared away from the battle fields of the Revolutionary and Napoleonic wars that the practice of arbitration spread or became more or less general. This movement, which had become a subject of international agitation, begun in the United States and England, was given a great impetus [63] through the successful arbitration of the Alabama Claims by the Geneva Arbitration of 1872. Since then arbitrations and arbitration treaties seem to have increased in a sort of arithmetical progression,[64] and they

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[61] The Commissions are generally composed of representatives of the members of the Unions, and sometimes exercise a sort of control or supervision over the Bureaus, many of which are located at Berne, Switzerland.

On this subject see especially the excellent article entitled "Administrative Law and National Sovereignty" by Professor Reinsch, in 3 *A. J.* (1909), 1–45; *Ibid.*, in *Public Int. Unions* (1911); and Neumeyer, in 18 *R. D. I. P.* (1911), 492–499 for a different view of the matter. See also the latter's *Grundlagen des int. Verwaltungsrecht* (1911).

[62] This fact was doubtless largely due to the absolute monarchs of this period who, ruling by divine right, were unwilling to submit their cause to any other than the God of Hosts.

[63] In 1828 the "American Peace Society" was founded by William Ladd of Massachusetts. In 1840 he published his prize essays on "*A Congress of Nations*," which contained a notable project of a "Court of Nations" as well. For a good description of his work, see an address by J. B. Scott, in 70 *Advocate of Peace*, 196–200.

The first American Peace Association appears to have been founded by David L. Dodge in New York in 1815. The "London Peace Society" was founded in 1816.

[64] For a very complete account of the arbitrations to which the United States had been a party up to 1898, see Moore's monumental *History and Digest of International Arbitrations*, in 5 vols. Darby (*Int. Tribunals*, 4th ed., 1904, pp. 769 ff.) gives a list of 228 instances of "formal" arbitration between 1794 and 1901. Of these there were ninety-one cases prior to 1872 and 137 between 1872 and 1901. The United States was a party in 62 cases; Great Britain, 81; France, 28; Prussia or Germany, 17;

have been particularly numerous since a new epoch in the history of internationalism was ushered in by the work of the Hague Peace Conferences of 1899 and 1907.

81. **Limitation of Armaments.** — In the latter part of the nineteenth century a kindred movement in favor of a limitation of armaments was making considerable headway. Ever since the Franco-German war of 1870, as a result of a Machiavellian statecraft combined with that policy of " blood and iron " which Bismarck has left as a heritage to modern Germany, and as a consequence of the new colonial imperialism and commercialism[65] which have taken possession of leading nations (notably of Great Britain and Germany), Europe has been virtually transformed into an " armed camp." This policy, indeed, preserved peace on the European Continent for a generation, but at a fearful economic, social, and moral cost to humanity.

82. **The First Hague Peace Conference.** — With a view of " seeking, by means of international discussion, the most effectual means of insuring to all peoples the benefits of a real and durable peace, and above all, of putting an end to the progressive development of the present armaments," Czar Nicholas II of Russia[66] called the First International Peace Conference which met at the Hague on May 18, 1899.[67]

Russia, 8. Many of these arbitrations were with or between Latin-American States, where this movement has made great progress. (On "Arbitration in Latin America," see a book by Quesada published in 1907.) La Fontaine (*Histoire sommaire*) gives a list of 177 instances between 1794 and 1900. Darby also gives a list of 249 instances of arbitration less formal in character (*i.e.* by Boards or Commissions) during the same period. He cites 21 instances of formal arbitration and 39 of the less formal sort during the first four years (1901–1904) of the twentieth century.

Prior to 1899 the number of arbitration treaties were, comparatively speaking, few in number, but they have greatly increased, especially since 1899. There were 64 such treaties between 1899 and 1907, and the number of arbitration treaties since the meeting of the first Hague Conference had mounted up to about 130 in 1908.

For a list of 67 arbitration treaties between 1900 and 1908, see 2 *A. J.*, pp. 824–826. The United States has been a party to over 20 such treaties. Fried (*Die moderne Friedensbewegung*, pp. 26–27) gives a list of arbitration treaties between 1899–1907. For Bibliographies on arbitration, see Griffin, *List of References*, published by the Library of Congress (1908); La Fontaine (1904); and Olivart.

[65] The founder or apostle of this new imperialism appears to have been Lord Beaconsfield. It was not fully adopted by Germany until about 1890. See especially the chapters on "National Imperialism" and "German Imperial Politics" in Reinsch, *World Politics* (1900). For references, see his "Bibliographical Notes."

[66] Russian *Rescript* of August 24, 1898.

[67] Twenty-six States were represented. Of these, twenty were European; five

The First Hague Peace Conference soon realized that even a limitation of the increase of military and naval expenditure was impracticable at that time, and devoted its chief energies to the secondary purpose for which it had been called, viz. to devise means of securing " the maintenance of general peace."

Owing mainly to the opposition of Germany, the Russian plan of inclusive and limited compulsory arbitration was rejected; but the British and American plan of a so-called " Permanent Court of Arbitration "[68] was adopted in spite of the objections of the German government, and arbitration was recommended " in questions of a judicial character, and especially regarding the interpretation of treaties."[69] A code of arbitral proceeding was also adopted and recommended.[70]

In addition to the " Convention for the Pacific Settlement of International Disputes," the Hague Conference of 1899 also agreed to two other Conventions, three Declarations, and expressed several wishes. Very important was the " Convention regulating the Laws and Customs of Land Warfare," based on the work of the Brussels Conference of 1874. The Conference also adapted the principles of the Geneva Convention of 1864 to maritime warfare. It " declared " against the launching of projectiles and explosives from balloons for five years; the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases; and the use of " dumdum " bullets. The Conference also expressed a series of six wishes in favor of consideration, at a subsequent Conference, of questions relating to the rights and duties of neutrals; the inviolability of private (enemy) property in naval warfare; and the bombardment of ports, towns, and villages by a naval force. It even expressed a wish that the Governments might " examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets."

(China, Japan, Persia, Korea, and Siam) were Asiatic; and only two (the United States and Mexico) American.

[68] The so-called Hague Tribunal is not even a Court; it is a panel or list from which judges may be chosen. See *infra*, § 314.

[69] Art. 16 of the Arbitration Treaty or First Convention.

[70] The great advantage of such a code is that it facilitates arbitration. It is no longer necessary for governments to enter into long and tedious negotiations respecting the mode of procedure on the occasion of each controversy.

83. **The Second Hague Peace Conference.** — Acting upon the request of the Interparliamentary Union which met at the St. Louis Exposition in 1904, President Roosevelt suggested the meeting of a Second International Peace Conference on September 21 of that year. In accordance with the terms of the resolution adopted at St. Louis, he recommended the following questions as proper subjects for consideration: —

"(1) The questions for the consideration of which the Conference at the Hague expressed a wish that a future Conference be called.

"(2) The negotiation of arbitration treaties between the nations represented at the Conference to be convened.

"(3) The advisability of establishing an International Congress to convene periodically for the discussion of international questions."

Owing, however, to the continuance of the Russo-Japanese War until September 5, 1905, the outbreak of the Russian Revolution which followed, and the further delay caused by the meeting of the Third Pan-American Conference, the Second International Peace Conference did not meet at the Hague until June 15, 1907.[71]

President Roosevelt generously conceded the honor of convening the Second Hague Conference to Czar Nicholas II, who, for obvious reasons, omitted " limitation of armaments " from the Russian program. But Great Britain insisted upon raising this question, and the United States was determined to ask for a consideration of the Drago Doctrine in a modified form, *i.e.* the question of prohibiting the use of armed force for the recovery of contract debts unless arbitration is refused, or in case of failure to submit to an arbitral award.[72]

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[71] Out of the 57 States claiming sovereignty, 44 Governments were represented at this Conference. These included 18 Latin-American States. The other two — Honduras and Costa Rica — were invited, and appointed delegates, but these did not take their seats. Asia was again represented by Japan, China, Persia, and Siam. Korea, having been occupied by Japan, was refused admission. As in 1899, the vote of Montenegro was cast by Russia's representatives, and Bulgaria was again permitted by Turkey to send delegates.

The number of delegates had increased from 100 in 1899 to 256 in 1907.

[72] On the *Drago Doctrine*, see especially Moulin, *La Doctrine de Drago* (1908); Drago, in 1 *A. J.*, 692–726; and Hershey, "The Calvo and Drago Doctrines," *Ibid.*, 26–45. For the "Instructions" of Dec. 20, 1902, by Señor Drago, the famous Argentine Minister and author of the Doctrine, see Supplement to 1 *A. J.*, 1–6. For further references, see *infra*, p. 334.

Owing mainly to the opposition of Germany, Austria, Japan, and Russia, the British Government failed in its attempt to secure a consideration of the question of a limitation of armaments or restriction of military expenditures. Germany even opposed the insertion of the words "more urgent than ever" in the resolution which was adopted confirming the Resolution of 1899 relative to this matter.[73]

Though the Second Hague Peace Conference of 1907 failed in some respects to meet the expectations even of conservative international jurists, it must be admitted that it was, on the whole, a notable success. It has to its credit thirteen Conventions or treaties, one Declaration, three wishes, and several recommendations.

The final Act of the Conference included the following Conventions or Treaties: —

I. "Convention (of 97 articles) for the Pacific Settlement of International Disputes" — a revision of the Convention of 1899 dealing with this subject.

II. "Convention (of 7 articles) respecting the Employment of Force, for the Recovery of Contract Debts" — the famous Porter Resolution embodying a modification of the Drago Doctrine.

III. "Convention (of 8 articles) relative to the Opening of Hostilities."

IV. "Convention (of 56 Articles) regarding the Laws and Customs of Land Warfare" — a revision of the Hague Code of 1899.

V. "Convention (of 25 articles) regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land."

VI. "Convention (of 11 articles) relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities."

VII. "Convention (of 12 articles) relative to the Conversion of Merchant Ships into War Ships."

VIII. "Convention (of 13 articles) relative to the Laying of Submarine Mines."

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[73] The Conference of 1899 had declared itself of the "opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind;" and it had expressed a wish that the Governments examine the question.

IX. "Convention (of 13 articles) respecting Bombardments by Naval Forces in Time of War" — an appliction of the rules governing bombardment on land to naval warfare.

X. "Convention (of 28 articles) for the Adaptation of the Principles of the Geneva Convention (of 1906) to Maritime Warfare" — a revision of the Hague Convention of 1899 which had adapted the Geneva Convention of 1864 to maritime warfare.

XI. "Convention (of 14 articles) relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime Warfare." This Convention includes provisions relating to the inviolability of postal correspondence, the exemption from capture of vessels engaged in coast fishing, etc., and regulations regarding the disposition of the crews of enemy merchant ships captured by a belligerent.

XII. "Convention (of 57 articles with an Annex) relative to the Establishment of an International Prize Court."

XIII. "Convention (of 33 articles) respecting the Rights and Duties of Neutral Powers in Naval War." [74]

The Conference renewed "for a period extending to The Third Peace Conference" the Declaration of 1899 prohibiting "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." It also declared itself "in principle" in favor of obligatory arbitration,[75] and that certain

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[74] For a table showing which States had signed the various Conventions of the Second Hague Conference by June 20, 1908 — the final date set for signatures of the plenipotentiaries — see 2 *A. J.* (1908), 876–877; Higgins, 530–531; or 2 Scott, *The Hague Peace Conferences*, 528–531. All but one (Paraguay) had signed the Final Act. The greatest delinquents were China (which had only signed the Declaration, the First Convention, and the Final Act); and Nicaragua (which had only affixed her signatures to the Final Act.) Nicaragua has since given her adhesion to nearly all the Hague Conventions. The only Conventions which fared badly were: the Porter Resolution which was signed (and even then with many reservations) by only 34 States; the Convention on Submarine Mines, which failed to receive the signatures of seven States (including Russia); the Convention relative to the Establishment of an International Prize Court, which was signed by only 31 States (Great Britain, Japan, Russia, and Brazil being among the non-signatories); and the Declaration prohibiting projectiles from balloons, which failed of 17 signatures. The United States did not sign Conventions VI, VII, and XIII. For a table showing ratifications, see 5 *A. J.* (1911), 769–770.

[75] The failure of the Conference to agree upon a definite plan of obligatory arbitration was mainly due to the opposition of Germany and Austria. The proposition of the United States in favor of exclusive limited compulsory arbitration had thirty-five votes in its favor and only nine against it, with three abstentions. See Professor Hull's excellent article on "Obligatory Arbitration and the Hague Conferences," in 2 *A. J.* (1908), 731–742; and 1 Scott, ch. 7.

" differences, and notably those relating to the interpretation and application of international conventional stipulations, are susceptible of being submitted to obligatory arbitration without any reservation."

A resolution, confirming that of 1899, in favor of the desirability of the limitation of military burdens was adopted; and " in view of the fact that military burdens have considerably increased in nearly all countries since the said year,"[76] the Conference declared it " highly desirable for governments to undertake again the serious examination of this question."

The Hague Conference of 1907 made the following notable recommendations and wishes: (1) A recommendation that the Signatory Powers adopt and enforce a Project or Draft of a " Convention (of thirty-five articles) for the Organization of a Court of Arbitral Justice "[77] as soon as they shall have reached an agreement upon the selection of judges and the constitution of the Court. (2) A wish that " in case of war the proper civil and military authorities make it their very special duty to insure and protect the maintenance of peaceful intercourse, and notably the commercial and industrial relations, between the peoples of the belligerent States and of neutral States." (3) The wish that "the Powers settle, through special conventions, the situation in respect to the support of the burden of military occupations by foreigners resident within their territories." (4) The wish that " the elaboration of regulations relative to the laws and customs of maritime warfare may figure in the program of the next Conference, and that in any case, the Powers apply, as far as possible, to maritime warfare the principle of the Convention relative to the Laws and Customs of War on Land." (5) A recommendation that the Powers hold a "Third Peace Conference, which might take place within a period similar to that which has elapsed since the preceding Conference, on a date to be set by joint agreement among the Powers."[78]

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[76] They have gone on increasing since 1907. It would be "highly desirable" to recommend action, or at least negotiation, on this subject at the next Conference.

[77] This draft, which was mainly based on a Project presented by the United States, was annexed to the first recommendation of the Conference and is contained in the Final Act. It failed of adoption because of the opposition of many of the smaller States led by M. Ruy Barbosa of Brazil. It provides for a Permanent Court of competent judges (number not specified) "representing the various juridical systems of the world" appointed for a term of twelve years and capable of reappointment. These judges shall meet at the Hague once a year if necessary (in June) to decide pending cases and designate three judges to whom it delegates its powers. The Powers were unable to agree upon the constitution of the Court and the apportionment of the judges.

For the text of this very interesting project, see Supplement to 2 *A. J.* (1908), 29–43; Higgins, *The Hague Peace Conferences*, 498–509; and Scott, *The Texts of the Two Hague Peace Conferences.* See especially the admirable article on "The Proposed Court of Arbitral Justice" by J. B. Scott, the real author of the Project, in 2 *A. J.* (1908), 772–810; and ch. 9 of 1 Scott's *Hague Peace Conferences.*

Aside from its inability to agree upon definite plans for securing a limitation of armaments, limited obligatory arbitration, and a real permanent Court of Arbitral Justice, the greatest failures of the Second International Peace Conference at the Hague were: its inadequate Convention relative to Submarine Mines; its failure to provide a Code of Rules for the Regulation of Maritime Warfare; and the unsatisfactory character of the Convention respecting the Rights and Duties of Neutral Powers in Naval War. An International Prize Court was agreed upon; but, owing mainly to the wide divergence between the Anglo-American and Continental systems of maritime jurisprudence, it was found impossible to agree upon a Code of Maritime Law which should govern the decisions of the Court.[79]

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[78] The attention of the Powers was also drawn to the "necessity of preparing the labors of that Third Conference sufficiently in advance to have its deliberations follow their course with the requisite authority and speed." It was added: —

"In order to achieve that object the Conference thinks it would be very desirable that a preliminary committee be charged by the Governments about two years before the probable date of the meeting, with the duty of collecting the various propositions to be brought before the Conference, to seek out the matters susceptible of an early international settlement, and to prepare a program which the Governments should determine upon early enough to permit of its being thoroughly examined in each country. The committee should further be charged with the duty of proposing a mode of organization and procedure for the Conference."

[79] On the Hague Conferences of 1899 and 1907, see especially Barclay, *Problems of Int. Practice and Diplomacy* (1907); Bustamante y Sirven, *La seconde conférence de la paix* (1909); Foster, *Arbitration and the Hague Court* (1904); Fried, *Die zweiter Haager Konferenz* (1908); Higgins, *The Hague Peace Conferences* (1909); * Holls, *The Peace Conference at the Hague* (1900); Hull, *The Two Hague Peace Conferences* (1908); De Lapradelle, *La conférence de la paix*, in 6 *R. G. D. I.* (1899); Lawrence, *Int. Problems and Hague Conferences* (1908); *Lémonon, *La seconde conférence de la paix* (1900); Meurer, *Die Haager Friedenskonferenz* (1905); Nippold, *Die Fortbildung des Verfahrens* (1905); *Ibid.*, *Die Zweite Haager Friedenskonferenz* (1908); *Scott, *The Two Hague Conferences* (1909); *Renault, *L'œuvre de la Hague* (1908). For a fairly complete bibliography, see De Lapradelle et Politis, in 16 *R. D. I. P.* (1909), 385-387.

For texts of the Conferences, see Higgins, *The Hague Peace Conferences;* Scott,

85. **The London Naval Conference of 1909.** — In order to find common meeting-ground on some of the most fundamental points of maritime law, a Conference of the leading Maritime Powers was held at London during the winter of 1908–1909. This Conference agreed upon a Declaration consisting of 71 articles embodying a code of rules regulating the rights of neutrals and belligerents with respect to neutral commerce. In importance these rules may be compared with those laid down in the famous Declaration of Paris of 1856. They contain important provisions relating to the law of blockade, contraband, continuous voyage, hostile aid or unneutral service, the destruction of neutral prizes, the transfer of the flag, enemy character, the right of convoy, etc.[80]

86. **The Science of International Law during the Nineteenth Century.** — The history of the *science* of International Law during the nineteenth century has never been written. All that can be indicated here are the general tendencies or lines of development and the names of some of the leading authorities.[81]

It may be said that modern writers on International Law are increasingly historical and positive, although certain abstract and theoretical tendencies are still very marked, especially on the Continent of Europe. The Pure Law of Nature School has almost wholly disappeared,[82] but publicists like Wheaton, Manning, Fiore, Pradier-Fodéré, Bonfils, and Piédelièvre still show the influence of ideas derived from theories of natural law.

Texts of the Two Hague Conferences, Supplement to 2 *A. J.* (1908); 2 Scott, *The Hague Peace Conferences;* Whittuck, *International Documents* (1908); and *Int. Law Situations* (1908), 117 ff.

[80] On the *London Conference of 1909*, see especially: Baty, *Britain and Sea Law* (1911); * Bentwick, *The Dec. of London* (1911); Bowles, *Sea Law and Sea Power* (1910); Bray, *British Rights at Sea* (1911); Cohen, in 27 *Law Quar. Rev.* (1911), 9 ff., and 26 *Rep. I. L. A.* (1911), 67 ff.; *Correspondence*, etc., and *Proceedings* (Cd. 4554 and 4555, 1909); Dupuis, in 18 *R. D. I. P.* (1911), 369 ff.; Harris, in 56 *Nat. Rev.* (1910), 393 ff.; * Lémonon, *La confér. navale de Londrès* (1909); Macdonnell, in 11 *J. Soc. Compar. Leg.*, 68 ff., and 26 *Rep. I. L. A.* (1911), 89 ff.; Myers, in 4 *A. J.* (1910), 571 ff.; * Niemeyer, *Das Seekriegsrecht* (1910); Reinsch, in 190 *No. Am. Rev.* (1909), 479 ff.; * Renault, *La confér. navale de Londrès* (1909); Stockton, in 3 *A. J.* (1909), 596 ff.; Westlake, in 67 *Nineteenth Cent.* (1910), 505 ff.; * *Int. Law Topics* (1910).

[81] For minor and contemporary authorities and the titles of works together with date of publication, the student is referred to the List of Authorities at the end of this volume.

[82] An exception is Lorimer. See note, *supra*, on p. 60.

It is perhaps most useful and convenient to divide nineteenth century authorities according to nationality. The leading British treatises in chronological order are those by Manning, Wildman, Phillimore, Twiss, Sheldon-Amos, Creasy, Hall, Maine, Lorimer, T. J. Lawrence, Walker, and Westlake. Other British writers who have materially contributed to the science of International Law in the nineteenth century are Atherley-Jones, Baty, Barclay, Bernard, Bentwick, Cobbett, Harcourt (Letters by Historicus), Higgins, Holland, Phillipson, and Spaight. The British publicists are, in the main, overwhelmingly positivist and historical.

In any enumeration of British authorities, the name of Sir William Scott (later Lord Stowell), the founder of British maritime jurisprudence, deserves a place by itself by reason of the important judicial decisions and opinions of that eminent judge.

Among the authorities contributed by the United States are (chronologically arranged): Kent, Wheaton, the elder Woolsey, Lieber, Halleck, Wharton, Field, Dana, W. B. Lawrence, Pomeroy, Snow, Moore, Davis, Wilson, Woolsey, Jr., Taylor, Stockton, J. B. Scott, Balch, Bordwell, Gregory, Hyde, and Reinsch. The judicial decisions of Judges Marshall, Story, and Gray are also of great importance. The American writers are essentially positivist, though perhaps more under the influence of Continental ideas than are British publicists. They are especially distinguished by impartiality and a certain freedom from the national bias which characterizes some of the British authorities.

The leading German and Swiss authorities since 1815 are Klüber, Heffter, Bluntschli, von Holtzendorff, Bulmerincq, Geffcken, Perels, Lueder, Ullmann, Liszt, Oppenheim,[83] Stoerk, Nippold, and Meili. The strong consciousness of military strength which followed the realization of German unity, together with the survival of Bismarckian methods and traditions, appears to have had a deleterious effect upon the development of International

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[83] Oppenheim, a German publicist, who has recently succeeded Westlake as Professor of International Law at Cambridge, England, has published an important treatise in English. His point of view is, however, mainly Continental. Rivier should perhaps be classed as a Swiss rather than a Belgian publicist, having been born in Switzerland and having served as Swiss Consul-General in Belgium, but I have classed him as Belgian because the greater part of his work was done at the University of Brussels, where he was appointed to a professorship as early as 1867.

Law in Germany since 1870, though evidence is not lacking that German publicists are recovering their former interest in this branch of jurisprudence. German idealism, combined with German system and thoroughness, must soon again place Germany in the front rank of contributors to our science.

If Germany has been losing, France has been gaining interest in International Law during the same period. Except for the special studies and collections of Cauchy, Cussy, Hautefeuille, Ortolan, Pistoye et Duverdy, etc., the contributions of Frenchmen appear to have been comparatively slight and unimportant prior to 1870. Since then we have had important treatises by Funck-Brentano et Sorel, Pradier-Fodéré (in eight volumes), Bonfils, Bry, Chrétien, Despagnet, Piédelièvre, and Mérignhac. There have also been valuable contributions by Dumas, Dupuis, Fauchille, Féraud-Giraud, De Lapradelle, Moulin, Pillet, Poinsard, Renault, Rey, and many others. The French publicists of the present era are predominantly historical and practical, and a clear style combined with scientific method makes their works, as a rule, remarkably attractive.

The best-known modern Italians are Brusa, Cassanova, Carnazza-Amari, Fiore, Mancini, and Pierantoni. Their views have been greatly influenced by Mazzini's teachings on the subject of nationality, which some of them have vainly attempted to erect into a principle of International Law.

The leading Spanish and Spanish-American authorities are Alcorta, Alvarez, Bello, Calvo (in six vols.), and Olivart.

Among authorities of other nationalities, the following appear especially worthy of mention from the standpoint of general reputation: the Belgian publicists, Descamps, Laurent, Nys, Rivier, Rolin, and Rolin-Jacquemyns; the Russians, F. de Martens and Kamarosky; the Dutch, Asser and Ferguson; the Scandinavian, Kleen; the Austrians, Lamarsch and Neumann; the Portuguese, Pinheiro-Ferreira and Testa; and the Greeks, Saripolas and Streit.

The Japanese have also materially contributed to the Science of International Law. The works of Ariga and Takahashi enjoy a European and American reputation.[84]

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[84] The most important *Forerunners of Grotius* were: (1) *Alfonso the Wise*, King of Castile (1252–1284), who, with the aid of collaborators, compiled a mediæ-

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val code of law called the *Siete Partidas,* which contained many rules of land and naval warfare. (2) *Giovanni de Legnano,* Professor of Law at Bologna, who (in 1360) wrote the first substantive treatise upon the laws of war. His work, which was not published before 1477, was entitled *De bello, de represaliis, et de duello.* (3) *Honoré Bonet,* a Benedictine monk and a Provençal, the author of a remarkable book which bears the peculiar title of *L'arbre des battailles.* It was written about 1385 and contains 132 chapters on the laws of warfare. This work was reëdited by M. Nys, in 1883. (4) *Christine de Pisan,* perhaps the first advocate of woman's rights, who was born at Venice in 1363 and was educated at the French Court. Among the voluminous works of this remarkable woman, there was one entitled *Livre des faits d'armes et de chevalerie,* which is largely copied, with due acknowledgment, from the *L'arbre des battailles* of Honoré Bonet. Both Bonet and Christine were far in advance of their age in humanitarian sentiments, but their works were nevertheless highly successful. (5) *Bello,* an Italian jurist and statesman, who published an important work entitled *De re militari et de bello* about 1558. (6) *Victoria* (1480–1546), a Dominican monk and professor at Salamanca, whose thirteen *Relectiones theologicæ* were first published in 1557. Two of these, the fifth entitled *De Indiis* and the sixth *De jure belli,* deal with the rights of the Indians and the laws of war. Victoria is probably the first modern thinker who conceived the idea of a society or community of nations based upon natural reason and sociability. It was Victoria who first used the phrase *jus inter gentes.* He set up the doctrine of the solidarity and *interdependence* of States and based the rights of the Spanish in the Indies upon the natural rights of commerce and communication. (7) *Ayala* (1548–1584), a military judge in the service of Philip II, who published a treatise in 1581 on the laws of war and military discipline. (8) The great Spanish Jesuit *Suarez,* who published his *Tractatus de legibus* in 1612. In a famous passage, which is translated by Westlake (see *Chapters,* pp. 26–27), Suarez for the first time clearly states the view that each State is a member of an international community or society of nations which are bound together by the necessity of mutual aid and communion. He also distinguished clearly between International Law (*jus gentium*) and the Law of Nature (*jus naturale*). (9) *Gentilis,* a Protestant Italian jurist who was appointed Professor of Civil Law at Oxford in 1588. His chief work, *De jure belli,* which was published in 1598 and reëdited by Professor Holland in 1877, furnished the model and framework for the first and third books of Grotius' *De jure belli ac pacis.* Gentilis is undoubtedly the most important of the forerunners of Grotius, but lacks the idealism, passion for justice, and broad humanitarianism of the latter. He is the founder of the historical school of international jurists, and is also in some other respects (as *e.g.* in his advocacy of the rights of neutrals) in advance of Grotius.

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PART I

STATES — THE SUBJECTS OF INTERNATIONAL LAW

CHAPTER V

STATES AS INTERNATIONAL PERSONS AND MEMBERS OF THE INTERNATIONAL COMMUNITY

87. **States the Main Subjects of International Law.** — The main International Persons or Subjects of International Law are States [1] — the only entities which can become real members of the international community. Strictly speaking, in international relations States alone have legal rights and duties. Though the Law of Nations, in certain cases, regulates relations between States and individuals as well as between the States themselves and thus appears to deal directly with individuals (as in the case of pirates and blockade runners), the laws themselves are rules between States, and it is only as members of a recognized political community that individuals can really be said to possess international rights and obligations.[2]

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[1] The only important exceptions to this rule are insurgent communities whose belligerency has been recognized. These enjoy a certain legal status as International Persons for purposes of warfare. They may be regarded as inchoate or embryonic States. See *infra*, § 115. The Papacy is an apparent rather than a real exception. See *infra*, § 89, p. 95.

[2] Some publicists (as *e.g.* Heffter, §§ 14, 58; Lawrence, *Principles*, 3d ed., §§ 42, 54–55; Kaufman, *Die Rechtskraft des international Rechts*, §§ 1–4; Westlake, *Chapters*, p. 2; and Wheaton, § 19) claim that individuals also are subjects of International Law; but this view is obviously based upon a confusion of terms. Persons and things are *objects*, not *subjects* of the Law of Nations. Westlake (*Chapters*, p. 2) asserts that "it would be pedantic to deny that the pirate and the blockade runner are subjects of International Law," but he admits that "it is only by virtue of rules prevailing between States that they are so." Rehm (*Untertanen als Subjekte völkerrechtliche Pflichten*, in 1 *Zeitschrift*, 53–55) thinks that individuals partake of the nature of subjects of the international community as far as international duties are concerned. He raises the very interesting question whether such Inter-

88. **The Essential Characteristics of a State.**[3] — A State is a permanent association of people politically organized upon a definite territory and habitually obeying the same autonomous government. Its essential and distinguishing characteristics are: (1) A people permanently organized for political purposes, *i.e.* the maintenance of law, liberty, and a relative equality of opportunity as conditions necessary for individual and social well-being. (2) A definite territory containing inhabitants suffi-

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national Commissions as that of the Danube do not create international rights and obligations for individuals. We might also ask whether International Unions do not partake of the nature of International Persons and create international legislation directly binding upon individuals as well as upon States. But at the present imperfect stage in the development of the organization and functions of these bodies, it is probably safer to deny them the character of international personality and to maintain that they only create law binding upon States.

Heffter (§§ 14, 48) appears to be alone in holding that sovereigns and diplomatic agents form a special category of subjects of International Law. They are merely organs and representatives of the State in international relations.

Several of the authorities (Bluntschli, Arts. 23, 360–363, 370; Bonfils, Nos. 157, 397 ff.; 1 Fiore, Nos. 680 ff.; Heffter, § 58; and 1 F. de Martens, §§ 85–87) maintain that man is a subject of International Law by reason of his existence as a human being; and that as such he possesses certain primordial, inherent, fundamental rights which are guaranteed by the Law of Nations. Such are, *e.g.* the rights of existence, liberty, protection of life and property, emigration and expatriation, freedom of worship, etc. These so-called rights of mankind are undoubtedly supported by a vast powerful public sentiment; but, with the exception of the rights of protection against the depredations of pirates and slave traders, they cannot be said to be guaranteed by the positive Law of Nations. Still less do they confer international personality upon individuals who must ordinarily look to the respective governments to which they owe allegiance for the effective protection of their international rights and interests.

For the correct view, see especially Gareis, § 53; *Heilborn, *System*, 58–138; Holland, *Jurisprudence* (10th ed.), 126, 355, 384 ff.; *Jellinek, *Oeffent. Recht*, 310–314; Liszt, §§ 5 and 11; 2 Lorimer, 131; *1 Oppenheim, §§ 13, 288–293, 344; 1 Moore, *Digest*, § 3; 1 Rivier, p. 48; Stoerk, in 2 Holtzendorff, §§ 113–114; Triepel, *Völkerrecht u. Landesrecht*, 13–21; *Ullmann (2d ed.), §§ 19, 107; and Zorn, § 6.

Arts. 3–5 of the Convention relative to the Establishment of an International Prize Court adopted by the Second Hague Peace Conference (1907) provide for appeal in certain cases by individuals as well as States. This may possibly be regarded as a minor exception to the rule that States are the sole subjects of international law. On the other hand, it may be argued that individuals even in these cases only enjoy this right of appeal as nationals of some particular State.

[3] For various definitions of the State, see Bry, No. 28; *Bonfils, Nos. 160–162; 1 Calvo, § 39; *Garner, *Introd. to Pol. Sci.*, 39 ff.; Heffter, § 15; Holland, *Jurisprudence* (10th ed.), 45 ff.; Jellinek, *Das Recht des modernen Staates* (2d ed., 1905), p. 173; Liszt, § 5; *1 Moore, *Digest*, § 3; Pomeroy, §§ 49 ff.; *1 P.-Fodéré, Nos. 69–81; Lawrence (3d ed.), *Principles*, p. 56; Le Fur, in 1 *Zeitschrift*, 222; 1 Rivier, 45–48; *Scott, *Cases*, 24–37; Snow, *International Law*, § 4.

ciently civilized and numerous[4] and resources sufficient to insure a certain degree of permanence, stability, and independence. (3) A certain degree of sovereignty, or autonomy and independence (*i.e.* relative freedom from a higher or an external control) and a government which is habitually obeyed.

89. **Associations or Institutions which do not enjoy International Personality.** — Among associations or institutions which do not enjoy international personality may be mentioned:

(1) Member-States of a Federal Union like that of the United States.

(2) Savages, nomads, pirates, and certain barbarous tribes and societies or States which have not as yet attained a sufficient degree of civilization or form of political organization adapted to the needs of international intercourse.

(3) Commercial corporations and Chartered Companies[5] like the old British East India or present-day African Companies. These companies sometimes exercise enormous political powers, even to the extent of making treaties and waging war; but their powers, however great, are merely delegated ones. In the case of Great Britain at least, the charters are mere grants of the British Crown which may be revoked at any time for sufficient cause. Besides, they are at the mercy of the sovereign Imperial Parliament which did not hesitate to abolish the old East India Company altogether in 1858. Yet it cannot be denied that some of these Companies do enjoy a sort of *de facto* international personality, but they have no legal status in international law.

(4) The same may be said of self-governing colonies or provinces like Canada and Australia. They are not only far more autonomous than the States of our Federal Union, but they even enjoy a degree of external independence, or a sort of *de facto*

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[4] No rule can be laid down as to the number of inhabitants or amount of territory necessary to the existence or recognition of a State. Sovereignty and international personality are enjoyed by States as small as Monaco with a territory of 15 square kilometers and 3137 inhabitants (according to 1 Fiore, p. 269 n.), and as large as the British Empire with its 400,000,000 inhabitants and 11,500,000 square miles.

[5] Lawrence (*Principles*, 3d ed., § 54) claims that such privileged corporations are subjects of International Law in a double sense: (*a*) as are individuals and ordinary corporations; (*b*) as occupying a special international position. Lawrence does not appear to have succeeded in making converts to this opinion, and has somewhat modified his views in his 4th ed., §§ 34, 42.

international personality.[6] But their constitution, although made and enacted by themselves, are technically grants of the British Parliament; and such freedom as they enjoy in connection with the negotiation of commercial treaties and the like is due to the discretion and wisdom of the British Government.

(5) Mere racial, social, political, and religious groups or institutions, such as nationalities,[7] social classes, political parties, and churches.[8] These may and often do exercise an important influence upon international relations, but they do not have even *de facto* international personality.

(6) The Papacy or the Pope,[9] who ceased to be a real member of the international community upon the annexation of Rome by Italy and his consequent loss of all temporal power in 1870. But the Pope still retains an *apparent* international personality. He still continues to send and receive diplomatic envoys and to make ecclesiastical treaties named Concordats. These agreements are not, however, treaties in the international sense of that term; and, although his representatives enjoy the privileges and immunities of diplomatic agents as a matter of traditional usage and courtesy, they are ecclesiastical rather than international officials. The Pope as such has no international rights or

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[6] Thus Canada participates in negotiations with foreign Powers like the United States and practically dictates the terms of treaties relative to commerce, international copyright, fisheries, etc. See *e.g.* 1, 2, and 5 Moore, *Digest*, §§ 168, 182 (p. 54), 840, etc.

[7] The main champions of the theory that nationalities are real, or at least desirable, subjects of International Law are Italian publicists. This theory is based upon the view that nations are the natural units of international relations, and have an inherent right to form themselves into States. Even admitting this to be the case, the legal status of such units would depend upon their recognition as members of the International Community.

Upon the principle of nationality, see especially De Roquette-Buisson, *Du principe des nationalités* (1895). For good criticisms of this theory, see 1 Nys, 337–348; 1 P.-Fodéré, Nos. 48–68; and 1 Mérignhac, 330 ff.

For references, see the notes in Bonfils (5th ed.), 9; 1 Fiore, 244; 1 Rivier, 49; and the Bibliography in De Roquette-Buisson.

[8] Fiore (*Droit inter. codifié* (1911), Arts. 8, 12, 65, etc.) places the Roman Catholic Church in the category of international persons. This opinion is shared by Chrétien, No. 77. This view is unworthy of serious refutation.

[9] The international status of the Pope is regulated by the Italian Law of Guarantees of 1871. For the English text of this law, see 1 Halleck (Baker's 3d ed.), 142–145. It guarantees his inviolability and secures him in the enjoyment of certain rights and privileges ordinarily enjoyed only by sovereigns. On the International Status of the Pope, see the Bibliography at the end of this chapter.

duties, inasmuch as he is without temporal subjects or territory. He is an *object* rather than a *subject* of International Law. As an evidence of his exclusion from the society of nations, we may point to the fact that he was not invited to either of the Hague Peace Conferences of 1899 or 1907.

90. **Extent of the Application of International Law to Barbarians and Savages.** — Leading authorities [10] on International Law accept Lorimer's division of humanity into three concentric circles or spheres — civilized, barbarous, and savage.[11] Only States with a certain degree of civilization somewhat resembling that of Western Europe and America are held to be entitled to full recognition as members of the international community. This is because a certain amount of mutual understanding and reciprocity of interests is essential to advantageous and continued international intercourse, and the existence of States with the will and capacity to fulfill their international obligations is a necessary qualification for membership in the modern family of States.

Although our system of International Law has undoubtedly had a Christian origin in the sense that it was developed by the so-called Christian nations of Western Europe and bears some traces of Christian influence, it should not be described as essentially Christian or European in character, as has been done by some publicists.[12] It is as applicable to non Christian and non-European States as to States of Christian and European origin. From the standpoint of the Law of Nations, the main test of civilization [13] is to be found in the quality of the existing Government. As far as race and religion are concerned, China, Japan, and Turkey are as well qualified for membership in the international community as are Russia, Spain, and the United States.

On the other hand there are publicists [14] who maintain that the scope of International Law is as wide as humanity itself and that its range extends over the whole earth. This view is in conflict with the actual practice of nations, more particularly with the practice of those States exhibiting colonizing or imperialistic tendencies.

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[10] *E.g.* Bonfils, No. 44; 1 Nys, 123 f.; and Pillet, in 1 *R. D. P. I.* (1894), 1 ff.

[11] Lorimer, *The Institutes of the Law of Nations* (1883), Bk. II, chs. 2 and 17, and Bk. III, ch. 2.

[12] For example, by Heffter, § 7; 1 F. de Martens, § 41; and 1 Lorimer, Bk. I, ch. 7.

[13] Westlake, *Chapters*, p. 141.

[14] For example, Bluntschli, Arts. 7–8; and Bonfils, No. 40.

The Law of Nations can be only partially applied to barbarians or half-civilized peoples,[15] and still less to savages; but it should be applied to the greatest extent practicable. Treaties with such peoples are morally binding, but it cannot be maintained that they are, strictly speaking, a legal obligation; for savages at least are almost wholly without that sense of understanding and capacity for government which would make them the proper subjects of legal rights and duties. They could not be held to a sufficient degree of accountability. But this makes the moral responsibility of those who deal with them all the greater.

91. **The Members of the International Community.** — The most active members of the international community, as evidenced by their participation in the work of the Second Hague Peace Conference, are, arranged in alphabetical order, as follows: The Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Haiti, Holland, Italy, Japan, Luxemburg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, Peru, Persia, Portugal, Roumania, Russia, San Domingo, San Salvador, Servia, Siam, Spain, Sweden, Switzerland, Turkey, The United States, Uraguay, and Venezuela.[16]

Less active members of the international community are Abyssinia, Costa Rica, Ethiopia, Honduras,[17] Liberia, and

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[15] For interesting judicial opinions on the status of half-civilized peoples like the Moroccans and Algerine pirates, see Sir William Scott in the cases of *The Helena* (1801), 4 C. Rob., 4; *The Madonna del Burso* (1802), 4 C. Rob., 169; and *The Hurtige Hane* (1801), 3 C. Rob., 324. See Scott, *Cases*, 2–3 n. and 45 ff.

[16] All of these States are fully sovereign with the exception of Belgium, Cuba, Luxemburg, and Switzerland; but a number of them are of slight international importance, as *e.g.* Haiti, Panama, San Domingo, the Central American States, and Montenegro. It is worth noting that of the 44 States represented at the Hague Conference of 1907, twenty-one were European, nineteen American, and four purely Asiatic. The vote of Montenegro was cast by Russia.

There is still a disposition to consider China, Persia, and Siam as incomplete members of the family of nations; but in view of the awakening of the East and the participation of these States in the work of the Hague Conferences of 1899 and 1907, this attitude can scarcely be maintained much longer, at least in respect to China.

[17] Costa Rica, Honduras, Ethiopia, and Korea were invited by Russia to send

Morocco. The small principalities of Monaco, Lichtenstein, and San Marino are fully sovereign States; but, although they undoubtedly enjoy a certain degree of international personality, they can hardly be considered full members of the family of nations. The same is true of the member-States of the German and Swiss Federal Unions and semi-sovereign States[18] like Annam, Crete, Egypt, Tunis, and Zanzibar. Afghanistan seems to be an example of a fully sovereign half-civilized State which is wholly without the pale of the international community. The Soudan is under the *condominium* (double protection) of Great Britain and Egypt. It is probably not a member of the international community.

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For fuller bibliographies, see Bonfils, pp. 205–206; and Olivart, *Bibliographie.*

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delegates to the Second Hague Conference. Costa Rica and Ethiopia failed to send representatives; those sent by Korea were not admitted, owing to the Protectorate established by Japan in 1904; while those of Honduras appeared so late that they took no part in its work. Scott, *The Hague Peace Conferences*, II, p. 180 n. It may be remarked that Costa Rica and Honduras seem to be entitled to full membership in the society of nations if they choose to claim this privilege; but so much can scarcely be claimed for half-civilized States like Abyssinia, Afghanistan, Ethiopia, and Morocco.

[18] For a list of Protectorates, see *infra*, § 105.

CHAPTER VI

CLASSIFICATION OF STATES

92. **Double Classification of States.** — From the standpoint of International Law, States may be doubly classified into Sovereign and Part-Sovereign; and into Simple, Composite, and Dependent.

93. **Sovereign States and Sovereignty Defined.** — Sovereign States are those which are fully autonomous and independent, *i.e.* wholly free from all higher control — a freedom not fully enjoyed by Part-Sovereign States. Sovereignty[1] is one and the same power, will, or capacity inherent in the State;[2] but

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[1] It is not necessary for our purpose to enter into any discussion of the many and complicated theories respecting the nature of sovereignty which have been held since the term was introduced into political science by Bodin in 1576. His definition of sovereignty as "supreme power (the *summum imperium* or *suprema potestas*) over citizens and subjects, unrestrained by the laws," is still perhaps the best, as it certainly is the simplest which has ever been formulated. Bodin, *De republica*, lib. 1, cap. 8. Grotius (lib. 1, cap. III, § 7) defined sovereignty as "the power whose acts are not subject to the control of another, so that they may be made void by the act of any other human will." For other definitions see Garner, *Introd. to Pol. Sci.*, 239.

A few recent publicists deny the sovereignty as well as the personality of the State. M. Duguit, the leading representative of this school, substitutes the idea of solidarity which he declares to be the fundamental fact of all human society. Duguit, *Études de droit public*, I, ch. 1.

[2] The authorities are divided on the question whether sovereignty is an essential characteristic of the State.

Among those who answer in the negative are Brie, *Staatenverbindungen*, 2–16; Jellinek, *Staatenverbindungen*, 36 ff. and *Das Recht des mod. Staates* (2 Aufl.), *passim*, especially 472 ff.; Laband, *Staatsrecht* (2 Aufl)., 61 ff.; Le Fur und Posener, 2; George Meyer, *Staatsrechtliche Erörterungen*, 3 ff., and *Staatsrecht* (4 Aufl.), 4 ff.; von Mohl, *Enzyklopädie*, 86; 1 Oppenheim, §§ 63 ff.; Rehm, *Allg. Staatslehre*, 63 ff.; Schulze, *Lehrbuch*, 26 ff.; and Rosin, *Souveraenetaet*, etc., 27 ff.

Among those who answer the question in the affirmative are Borel, *Étude sur la souv.*, 52 ff. and 167; Bornhak, *Allg. Staatslehre*, 9; Hänel, 1 *Staatsrecht*, 113, 798; Le Fur, *État fédéral*, 395 ff.; 1 Mérignhac, *Traité*, 107 ff.; von Seydel, *Bayerishces Staatsrecht, passim*; and Zorn, 1 *Staatsrecht* (2 Aufl.), 47 ff., 84 ff.

it has a double aspect — an external as well as an internal face.[3]

94. **Internal Sovereignty.** — On its internal side, sovereignty implies such supreme control over everything found on a State's territory and such power to regulate the conduct of its subjects as may be necessary to realize the purpose for which the State exists. To this end it sets its own limits as to the extent and scope of its power or jurisdiction. The Germans call this the *Competenz-Competenz*.

95. **Limitations on External Sovereignty.** — On its external side, sovereignty may be limited in various ways:

(1) By the rules, principles, and customs of International Law. For a violation of these rules which are binding upon all members of the international community, a State is internationally responsible.

(2) The conventional Law of Nations or treaties, subject to the clause *rebus sic stantibus* which is generally implied. For a serious breach of its express agreements, a State is responsible to those members of the family of nations whose rights have been violated.

(3) Certain delegations of sovereignty and State servitudes,[4] such as the exercise of financial, judicial, or administrative functions by representatives of a foreign Power, and the temporary occupation of territory by foreign troops, etc.

(4) Treaties of alliance, guarantee,[5] and protection by which a State obligates itself to give aid to another under certain conditions or to assist in maintaining a certain state of affairs agreed upon.

(5) Certain relations of suzerainty and vassalage or protection and dependence which are supposed not to be in derogation of sovereignty. Such were the feudal relations between the Holy Roman Empire and the States of Germany between 1648 and

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[3] On the distinction between external and internal sovereignty, see Bluntschli, Arts. 64 ff.; * Bonfils (Fauchille), No. 164; Despagnet, No. 74; Heffter (Geffcken), § 19; Holland, *Jurisprudence* (10th ed.), 48–49, 359–361, 384; * Jellinek, *Das Recht des mod. Staates*, 461–470; * Le Fur, in 1 *Zeitschrift* (1906), 232 ff.; *Ibid.*, *L'État fédéral*, 443 ff.; 1 Mérignhac, 117 ff., 162 ff.; Snow, § 5; Ullmann (2d ed.), § 19, p. 89; Wheaton, § 20.

[4] On International Servitudes, see *infra*, §§ 166–168.

[5] On Treaties of Guarantee, see *infra*, § 301.

1806, the position of Napoleon I in his relations with the members of the Confederacy of the Rhine and other European States like Spain and Naples, and the former relations between the Ottoman Empire and such States as Bulgaria, Roumania, etc.

It is generally held that the above limitations or restraints are not legal restrictions on sovereignty on the grounds that they are mere delegations of power, or that they do not really bind the will or power of the sovereign who has thus freely chosen to bind himself[6] through *auto-limitation* or *auto-determination*.

But there are many instances where the relations between States are of such a nature that it cannot be maintained that all the States involved in the relationship are sovereign. To these cases the terms "part-sovereign," "semi-sovereign," "non-sovereign," and "dependent" have been variously applied. They include members of Federal and Real Unions, Confederacies, and the majority of those States which are said to be under the protection of another State.

The above analysis shows that external sovereignty or independence must not be understood in any absolute or unrestricted sense. Whatever may be the case in theory, in practice it is very much limited[7] and wholly relative. Although it is well to insist that States must enjoy a certain degree of autonomy and independence in order to possess an international status, the Law of Nations must also take cognizance of the other great fact of interdependence or the international solidarity of modern States and peoples.

96. **Classification of States.** — Besides the division into sovereign and part-sovereign, States may also be classified into simple or unitary, composite, and dependent or semi-sovereign.

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[6] By means of a legal fiction, the sovereign defeated in warfare is also supposed to have freely consented to such humiliating terms (*e.g.* the cession of territory, the limitation of his land or naval forces, and the demolition of fortresses) as may have been imposed upon him by a treaty of peace.

But "if a State . . . parts with its rights of negotiation and treaty, and loses its essential attributes of independence, it can no longer be regarded as a sovereign State, or as a member of the great family of nations." 1 Halleck (Baker's 3d ed.), p. 69; *cf.* 1 Phillimore, §§ 75–76.

The mere payment of tribute is not regarded as in derogation of sovereignty.

[7] That sovereignty does not imply unlimited power is clearly shown by Jellinek, *Das Recht des mod. Staates*, 461–470. *Cf. Ibid.*, *Staatenverbindungen*, 35 ff., and *Gesetz und Verordnung*, 196 ff. See also Le Fur, *État fédéral*, 438 ff.; and 1 Mérignhac, *Traité*, 219 ff.

97. (I) **Simple States.** — *Simple States* are those with a single supreme central government representing the will and power of the State, " whether it be the will of a sovereign ruler, or the collective will of a popular body or a representative assembly."[8]

They include such complex incorporate unions with colonies and dependencies like the British Empire as well as simple unitary States like Holland and Italy. The majority of Simple States are fully sovereign and independent, and enjoy complete international personality.

" The Simple State may be either single, *i.e.* wholly separate and distinct from any other State, or it may be connected with another State by what is called a Personal Union." [9]

98. **Personal Unions.** — A *Personal Union* consists of several States temporarily united under the same ruler or sovereign. It is not, properly speaking, a composite State, nor does it enjoy any degree of international personality. Each State retains its own sovereignty, and remains a distinct and separate International Person or Subject of International Law.[10]

With the annexation of the Congo Free State by Belgium in 1908, the last existing example of a Personal Union disappeared. The other historical illustrations of this form of so-called union most frequently cited are: the dynastic Union between Great Britain and Hanover extending from 1714 to 1837; that between the Netherlands and Luxemburg between 1815 and 1890; that of Prussia and the principality of Neuchâtel down to 1857; and the Union between Spain and the Holy Roman Empire during the reign of the Emperor Charles V in the sixteenth century.

99. (II) **Composite States.** — *Composite States* are permanent Unions or associations of two or more States with certain common functions and organs of government. From the standpoint of International Law, they may be classified into Real Unions, Confederacies, and Federal Unions.

100. (1) **Real Unions.** — A *Real Union* exists where several States, otherwise sovereign and independent, are perpetually

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[8] 1 Moore, *Digest*, p. 21

[9] *Ibid.*

[10] The question has often been raised whether one member of a Personal Union may wage war against another. Theoretically, this would be possible; practically, it is improbable in the highest degree.

united under the same dynasty, so that they together form a single International Person.[11] Each member of the Union retains its internal sovereignty and its own constitution; but there are at least common ministers or joint councils who advise the monarch on questions affecting the interests of the Union[12] as a whole, more especially in matters pertaining to war and peace, the common finances, the control of the army and navy, and the conduct of foreign affairs.

Since the separation of Norway and Sweden[13] in 1905, the sole surviving Real Union of international importance[14] is that formed by Austria-Hungary, at least since 1867.[15]

101. (2) **Confederacies.** — A *Confederacy* (*Staatenbund* or league of States) is a permanent association or union of States joined together by treaty or compact for purposes of common defense and general welfare. The Union has organs and functions of its own, especially for the conduct of foreign affairs; but each

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[11] Nevertheless the separate members may also enjoy a certain degree of international personality, Thus Norway and Sweden had separate commercial flags and extradition treaties.

[12] Norway-Sweden did not have even a common Minister of Foreign Affairs, the king acting through the Swedish Foreign Minister; in questions touching the interests of both kingdoms, the monarch was bound to take the advice of joint Councils of State. Matters of interest common to both countries were regulated by concurrent identical laws or resolutions. There was no common legislature.

Austria-Hungary has three common Ministers for Foreign Affairs, War, and Finances. There is even a sort of rudimentary common legislature consisting of two Delegations or Committees of sixty members, each representing the Austrian and Hungarian Parliaments. But the bulk of the legislation common to both countries (including the tariff) is in the form of practically identical statutes passed for a term of years. In substance these statutes are treaties which are the result of negotiations.

On the "Dual Monarchies," see especially Lowell, *Governments and Parties in Continental Europe*, II, ch. 10; Wilson, *The State*, Pt. IX, and the authorities there cited.

[13] The authorities differ in their opinions on the nature of the late Union between Norway and Sweden, but the majority rightly consider it to have been a Real Union.

[14] Oppenheim (I, p. 127 n.) says "there is a Real Union between Saxe-Coburg and Saxe-Gotha within the German Empire." This is denied by Jellinek, *Staatenverbindungen*, 208 f.

[15] There is a difference of opinion as to whether the Pragmatic Sanction of 1723 created a real or a mere Personal Union between Austria and Hungary. The main authorities on the Real Union are Jellinek, *Staatenverbindungen* (1882), 197–248; Juraschek, *Personal and Real Union* (1878); and Blütigen, in 1 *Zeitschrift* (1906), 237 ff.

State remains otherwise sovereign and independent, and also enjoys international personality.[16] The main organ of the Union is a Diet or Congress exercising delegated powers and consisting of delegates from each of the member States whose votes are usually cast as a unit. The central power does not, as a rule, attempt to deal directly with individuals as such; it operates upon and through the member-States themselves.

There are no existing examples of a Confederacy, but this form of International Union has been a very important factor in State making. The most important instances are: The United Netherlands from 1580 to 1795; the United States of America under the Articles of Confederation from 1781 to 1789; the Swiss Confederacy before 1798 and from 1815 to 1848; and the Germanic Confederatiom from 1815 to 1866.

102. (3) **Federal Union.** — A *Federal State* (*Bundesstaat* or Union of States) is a perpetual Union of non-sovereign States with a constitution, central organs, and government of its own. The member-States possess certain inherent, original, or non-delegated powers of their own; but although both central and State governments are supreme within their own respective spheres, the central government deals directly with individuals and practically (if not legally) fixes the limits to its own competence, *i.e.*, the extent and scope of its power and jurisdiction. Consequently, the Federal Union is fully sovereign and independent. The Federal State alone is a complete International Person, but the member States may enjoy a slight degree of international personality.[17]

Existing examples of a Federal Union enjoying *de jure* international personality[18] are: The United States since 1789, Switzerland since 1848, Mexico since 1857, the Argentine Republic since 1860, the German Empire since 1871, Brazil since 1891, and Venezuela since 1893.[19]

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[16] Most of the authorities deny international personality to the Union on the ground that it is not a State, but this view contradicts the facts for the sake of a theory.

[17] This is denied by most publicists, but their opinion on this point is not in strict accord with the facts. It is certainly true that the member States of the United States are wholly without international personality; but this is not altogether true of the German States and Swiss Cantons. The member States of the German Federal Union retain the rights of legation and treaty making within certain limits. The Swiss Cantons also preserve a very limited treaty-making power.

[18] Canada, Australia, and South Africa are examples of Federal Unions without *de jure* international personality. They are not even States from the purely legal or technical point of view.

103. (III) **Dependent or Semi-Sovereign States.** — *Dependent* or *Semi-Sovereign States*[20] are States which, without being members of a composite State, retain a certain degree of sovereignty and international personality in spite of the fact that in the conduct of foreign relations they are at least partially subject to the control of another State. This control usually extends to internal affairs as well.

The relation is one which is almost necessarily anomalous, more or less vague, and difficult to maintain. It usually ends in either annexation or complete independence. There are no general or hard and fast rules governing the relationship; for the degree of dependence varies in each particular case, and ranges from almost complete dependence to virtual independence.

In general, it may be said that the foreign relations of the subordinate State are subject to the control or direction of its superior, which usually exercises the most important powers of external sovereignty, such as the right of legation and the treaty-making power. But the inferior State may share in the exercise of these functions to a greater or less degree; and it is not necessarily treated as a belligerent in a war to which the superior is a party.[21]

It is customary to subdivide Dependent or Semi-Sovereign States into two classes:

104. (1) **States under Suzerainty.** — *Vassal States or States under Suzerainty.* These terms are derived from feudalism and

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[19] For Bibliographies on the Federal Union, see Hart, *Introduction to Fed. Gov't.*, 178–192; and Le Fur, *État fédéral*, x–xvii.

[20] The best definition is perhaps that given by Klüber (§ 24): "When one State is dependent on another in the exercise of one or more of the essential rights of sovereignty, but is otherwise free, it is called dependent, or *mi-souverain*."

[21] This was recognized by the British Court of Admiralty, which decided that the Ionian Islands (then in the relation of a Protectorate to Great Britain) remained neutral during the Crimean War. *The Ionian Ships*, 2 Spinks, 212.

There is no reason why the same principle should not be applied to a State under Suzerainty which apparently enjoys a greater *de facto* independence. Turkey did not interfere in the war between Bulgaria and Servia in 1885. Egypt issued a separate Declaration of Neutrality during the Russo-Japanese War.

were originally used to describe the feudal relation of service and protection between the vassal and his lord who became known as the former's Suzerain in the course of the fifteenth century. They have often been used to characterize the relations between the German princes and the Holy Roman Germanic Empire, at least during the period from 1648 to 1895. After becoming almost extinct, the term " suzerainty " was revived in the nineteenth century and applied to the relations between the Ottoman Empire and such tributary States as Roumania, Servia, and Bulgaria,[22] even after these had become practically independent. This terminology is no longer applicable to modern conditions, but it still survives in treatises and diplomatic documents.

Theoretically, Vassal States are supposed to possess only those rights and privileges which have been expressly granted to them, but actually they would seem to be well-nigh independent of their Suzerain.

This class of States has almost disappeared from international relations,[23] and there only remains the class generally known as International Protectorates to be classified under the head of Dependent States.

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[22] All of these States now enjoy a *de jure* as well as a *de facto* independence. The last to declare its complete independence was Bulgaria in 1908. Up to that time Bulgaria was still theoretically a vassal and tributary State, but went to war with Servia without consulting Turkey or the Powers in 1885. The conditional independence of Roumania, Servia, and Montenegro was recognized by the Great Powers at the Congress of Berlin in 1878.

[23] Egypt is generally cited as the main surviving example of a Vassal State. It is still nominally under the suzerainty of Turkey, but its administration has really been under the sole control of Great Britain ever since the British occupation of 1882. It is now (at least since the Franco-British Agreement of 1904) a British Protectorate.

The only existing Vassal State of any importance appears to be Crete, which was recognized as an autonomous State under the suzerainty of the Turkish Sultan by the Powers in 1899.

The status of the Transvaal or South African Republic prior to the outbreak of the Boer War in 1900 has been a subject of much controversy. In the Convention of 1881 it was declared to be under the suzerainty of Great Britain. The word " suzerainty " was omitted in the Convention of 1884, but the Republic remained under such restrictions in respect to the exercise of the treaty-making power (Great Britain reserving the right of veto) that it must be considered to have been a British Protectorate. For the provisions of the treaty, see 1 Moore, p. 28. For bibliographies on Egypt and the Transvaal, see Bonfils (Fauchille), 5th ed., pp. 105 and 109.

105. (2) **International Protectorates.**—An *International Protectorate* exists where a weak or inferior State has through treaty or otherwise been placed under the protection of a more powerful one (at least as far as the conduct of its foreign affairs are concerned) for the sake of greater safety, or because it was virtually forced into this position. Although the practice of keeping client or vassal States in a condition of dependence or partial subjection was freely practiced by the Romans as a means of conquest, the modern Protectorate is ostensibly instituted for the benefit of the protected State. But it is frequently employed as a means of exploitation and disguised conquest even in modern times.

The position of the protecting State is supposed to be like that of a trustee, and his obligations resemble somewhat those of a guardian toward his ward. But it must be admitted that the conditions on which the trust is held are often violated. The main duty is that of protection, and the protector incurs a certain measure of international responsibility for the conduct of his ward which gives him the right of intervention in the internal as well as the external affairs of the protected State. The dependent State is bound to submit to such control and allow such intervention as it has agreed to permit; and it usually retains only a slight degree of international personality.

In contradistinction to States under Suzerainty, treaties made by the protector do not apply to States under a Protectorate unless it is expressly so stipulated; and protected States retain all rights and privileges which have not been expressly yielded. But, as a matter of fact, they are usually much more dependent than vassal States have been. Neither in principle nor in practice is there any clear or fundamental difference between the two classes. The Protectorate is in fact the modern form of clientage or vassalage.

Existing International Protectorates[24] are those of Great Britain over Egypt, Zanzibar, and the three States of Borneo; of France[25] over Tunis, Annam, Cambodia, and Morocco; of

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[24] The main historical Protectorates of the nineteenth century were those of Great Britain over the Ionian Islands (1815–1866) and the Transvaal (1881–1902); and of Austria, Prussia, and Russia over the "free and independent" city of Cracow (1815–1846).

[25] Madagascar, formerly a French Protectorate, was annexed by France in 1896.

Germany [26] over the king of Togo, a portion of New Guinea, and the Marshall Archipelago; of Russia over the Khanates of Khiva and Bokhara; of Japan over Korea; [27] and of the United States over Cuba.[28]

106. **Distinctions between an International Protectorate, a merely Protected State, and a Colonial Protectorate.** — International Protectorates should be distinguished from merely *protected States* like Panama [29] and the San Marino Republic [30] on

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With the consent of England, France also assumed a Protectorate over Morocco in 1904. Germany intervened, and the Congress of Algéçiras of 1906 guaranteed the economic freedom and territorial integrity of this country. But in 1911 Germany recognized the Protectorate of France over Morocco in return for territorial concessions in the French Congo region.

Ethiopia is another African State whose independence was guaranteed by England, France, and Italy in 1906. Italy exercised a Protectorate over Abyssinia for some years before her crushing defeat by King Menelek in 1896. Owing to the intrigues of Russia, England was also forced to give up the Protectorate which she had established over Afghanistan in 1879. Recent events seem to show that Russia and England exercise a virtual Protectorate over Persia.

[26] It is doubtful whether the so-called "administrative" Protectorates of Germany are real International Protectorates. See Meyer, *Die Stellung der deutschen Schutzgebiete* (1888), 69 ff.; and Despagnet, *Essai sur les protectorats* (1896), 167 ff. They should perhaps be classed as Colonial Protectorates. See *infra*, § 185.

[27] On the International Status of Korea as a Protectorate of Japan's, see Rey, in 13 *R. D. I. P.* (1906), 40–58. This Protectorate, established in 1905, ceased in 1910 when Korea was annexed by Japan.

[28] Cuba is free to conduct her own external and internal affairs, but her relations with the United States are nevertheless those of a Protectorate. According to the Platt amendment of 1901 (which was incorporated into an ordinance appended to the Cuban constitution and embodied in the treaty of 1903–1904 between Cuba and the United States), "the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba," nor "assume or contract any public debt" for the payment of which the ordinary revenues of the island shall be inadequate. Cuba also agreed that "the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a Government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba." 6 Moore, *Digest*, § 910.

The United States has intervened in Cuba in pursuance of the rights thus granted. For the view that Cuba remains a fully sovereign State, see Benton, *Int. Law and Diplomacy of the Spanish-American War*, 290–291. See Whitcomb, *La situation int. de Cuba* (1905), ch. 5, for the view that Cuba is a part-sovereign State.

[29] For the text of the Convention of 1903 between the United States and Panama, see Supplement to 3 *A. J.* 130 ff.

The United States guaranteed the independence of Panama (Art. 1); but, excepting in the Canal Zone, the sovereign rights of Panama remain unimpaired.

the one hand, and from *Colonial Protectorates* on the other. The latter, in which the inhabitants and territory protected do not form States within the modern meaning of this term, will be discussed under the head of "Modes of Acquiring Territory."[31]

Some of the authorities place the North American Indian tribes and the vassal or protected Princes and States of India under the head of International Protectorates. They are undoubtedly, in a sense, Protectorates, but certainly not International Protectorates. Neither do they fit into the category of Colonial Protectorates. They seem to constitute a class by themselves.[32]

107. **The North American Indians.** — Prior to 1871, the North American Indian tribes were regarded by the United States as "domestic dependent nations" in a "state of pupilage resembling that of a ward to his guardian."[33] They were held to possess certain rights of occupancy to the soil, but the

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Panama is undoubtedly under the protection of the United States and, although the *de facto* political and economic relations between the two Republics are of such a nature as to place Panama in a state of actual dependence (even greater than in the case of Cuba), we cannot speak of a Protectorate in the legal or technical sense of this term in the case of Panama.

On the International Status of Panama, see Rougier, in 11 *R. D. I. P.* (1904), *Chronique*, 604 ff.

[30] A good historical example of the merely protected State is the Confederacy of the Rhine (1806–1813), which recognized Napoleon I as its "Protector." Its members were, however, virtually client or vassal states.

The small Republic of San Marino is under the "exclusive protective friendship" of Italy, but is not a Protectorate.

The tiny principality of Monaco is now wholly unprotected as well as sovereign. The little so-called Republic of Andorra in the Pyrenees, which is not even a State, is under the joint protection of France and the Spanish Bishops of Urgel. It remains, as Lawrence (*Principles* (3d ed.), p. 73) puts it, "an antiquarian curiosity and a jural puzzle."

[31] See *infra*, § 185.

[32] An Act of Congress, dated March 3, 1871, declared: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." But agreements with Indian tribes, subject to the approval of Congress, have been made since the passage of this act, 1 Moore, *Digest*, § 17, p. 37.

[33] See especially Chief Justice Marshall, in *Cherokee Nation* v. *Georgia* (1821), 5 Peters, 1, and *Worcester* v. *Georgia* (1832), 6 Peters, 515; Justice Gray, in *Elk* v. *Wilkins* (1884), 112 U. S. Rep. 94; and Justice *Miller* in *U. S.* v. *Kagama* (1886), 118 U. S. Rep. 375.

actual title to their lands, which was originally based on discovery and settlement,[34] had become vested in the National Government by virtue of the rights of succession. As long as they remained connected with their tribal organizations, they were regarded as "domestic subjects"; but it was held that "an Indian treaty, when duly solemnized, is as much a law of the land as is a treaty with a foreign power." [35]

108. **The Princes and States of India**. — Closely analogous to the status of the North American Indian tribes before 1871, and yet differing from it on some points, is that of the Princes and States of India in their relations with Great Britain. Like the Indian tribes in the United States, the six hundred protected Princes and States of India have no international relations with foreign Powers or with each other. The preamble of an Act of Parliament [36] of 1876 described them as in "alliance with Her Majesty," and they are held to be entitled to British protection on the high seas or in foreign parts. They cannot even send representatives to Calcutta, but must communicate with the British Government through the British representatives at their courts. In 1891, the official Gazette published [37] by the Government of India declared:

"The principles of International Law have no bearing upon the relations between the Government of India as representing the Queen Empress on the one hand, and the native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter." [38]

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[34] Chief Justice Marshall, in *Johnson* v. *McIntosh* (1823), 8 Wheaton, 543, and Scott, 71.

[35] 1 Moore, *Digest*, p. 37. On the *Status of the American Indian*, see * 2 Butler, *Treaty-making Power*, ch. 14; 1 Calvo, § 71; Chrétien, No. 249; 1 Fiore, No. 343; 1 Halleck (Baker's 3d ed.), 75–78; Lawrence, 1 *Commentaire*, 264 f.; * 1 Moore, *Digest*, §§ 15–17; * Scott, *Cases*, 398–412, or Snow, *Cases*, 230–241; 2 Wharton, *Digest*, ch. 8, §§ 208–211; Wheaton, § 38 (Atlay's ed., § 38 *a* and Dana's ed., note 24); and 1 Willoughby, *The Const. Law of the U. S.* (1910), ch. 20.

[36] 39 and 40 Vict., c. 46. See Westlake, *Chapters*, p. 212.

[37] *Ibid.*, p. 213.

[38] Cited by Westlake, 1 *Int. Law*, p. 42, and *Chapters*, pp. 215–216. Westlake, our main authority on this subject, quotes freely from Lee-Warner, *The Protected Princes of India*; and Tupper, *Our Indian Protectorate.*

On the *Indian Princes*, see also Hall, 27–28 n.; 1 Rivier, 88–89; Wheaton (Atlay's ed.), § 38 *c*.

109. **(IV) Neutralized States.** There is another class of States which does not fit well into our scheme of classification. This is the neutralized State. Neutralized States are those whose neutrality, independence,[39] or territorial integrity are permanently guaranteed by an international agreement of the Great Powers on condition that they agree never to go to war except in case of attack, and never to assume international obligations (as *e.g.* enter into a treaty of alliance or guarantee) which might lead them into hostilities. The purpose of such permanent neutralization has generally been the maintenance of the balance of power in Europe by removing a temptation to aggression and creating a Buffer-State between rival Powers. A violation of the neutrality of a permanent neutralized State imposes upon the guaranteeing Powers the duty of intervention [40] in behalf of the injured State.

The permanent neutralization [41] of States should be distinguished from the status of mere temporary neutrality during war on the one hand, and from the possible neutralization of parts of a State,[42] or of rivers, straits, canals, lakes, gulfs, and seas on the other.[43] By analogy the term has also been extended to certain persons and things like surgeons, hospitals, and hospital ships in time of warfare.[44]

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[39] Independence is not expressly guaranteed in the case of Switzerland. Unlike Switzerland, the integrity and inviolability of the territory of Belgium was not expressly guaranteed. Luxemburg was merely given a guarantee of neutrality. But guarantees of independence as well as of territorial integrity and inviolability must be implied; for, as Westlake (*Int. Law*, I, p. 28) justly remarks: "The territory of a State cannot be violated without infringing its neutrality, and it may be added that a similar infringement would result from an attack on its independence."

[40] There is a difference of opinion among the authorities as to whether in such a case as the "collective" guarantee of the neutrality of Luxemburg, the guarantors are bound to act singly or separately, should any of them decline to join in common or collective action. For the contrary views of Bluntschli and Lord Derby, see Hall (6th ed.), 337–338. For a refutation of Lord Stanley's (Derby's) view that the guarantors are not bound to act separately, see Piccioni, *Essai sur la neutralité* (2d ed., 1902), 21 ff. Such a doctrine would deprive the guarantee of efficacy.

[41] We might also distinguish between permanent and temporary neutralization, as in the case of China during the Russo-Japanese War. See Hershey, 248.

[42] The most conspicuous example of the neutralization of a part of a State is that of a portion of Savoy which was included in the neutralization of Switzerland in 1815. In 1860, Savoy, until then belonging to Sardinia, was ceded to France, which thus succeeded to the rights and duties pertaining to the neutrality of these provinces. These duties were recognized in 1883, when the French Government discontinued the construction of fortifications near Geneva in deference to the complaints of the Federal Council of Switzerland. There is no agreement as to how far these rights and duties extend in the case of a neutralized province.

The authorities seem to be about equally divided on the question whether permanently neutralized States remain fully sovereign. On the one hand it is argued that neutralization "does not carry with it the renunciation of any faculty of state life. It is merely an undertaking not to do certain things, and no more impairs sovereignty than does an undertaking not to interfere in a particular war. . . . Besides, it is necessary that for every part of the civilized world the full powers of sovereignty should exist."[45] On the other hand, it is justly urged that to permanently deprive a State of the right to declare war or contract alliances at will, is manifestly a serious restriction on external sovereignty or freedom of action such as fully sovereign States enjoy. This is a fact which no amount of plausible argument can extinguish.[46]

The sole examples of permanently neutralized States are Switzerland[47] (since 1815), Belgium (since 1831), Luxemburg[48] (since 1867),[49] and perhaps Norway in 1907.[50]

Another case of neutralization of a part of a State is that of the two Ionian islands of Corfu and Paxo, together with their dependencies, which were declared permanently neutral by England, France, and Russia when the group to which they belong were annexed by Greece in 1864. The king of Greece on his part agreed to "maintain such neutrality."

[43] See *infra*, pp. 202 n and 211 and n.

[44] See *infra*, §§ 369 ff. and 416 ff.

[45] This is the argument of Westlake, I, pp. 28–29.

[46] It is not merely that a neutralized State is not fully sovereign; it is less free in its choice of means than are other States. Oppenheim (I, p. 143) points out that a State does not lose any part of its sovereignty by concluding a treaty of arbitration. True, but suppose it were generally bound to arbitrate all or any class of international disputes, while other States retained the right to go to war. Would such a State be fully sovereign? If we had a general treaty of obligatory arbitration, the contracting States would remain sovereign because all would be equally and reciprocally bound.

Mérignhac (II, p. 43) urges that treaties of guarantee do not destroy sovereignty. Such treaties do not necessarily imply a limitation of sovereignty — not unless the State whose rights are guaranteed binds itself permanently not to exercise important or essential sovereign powers such as other States enjoy.

[47] The neutrality of Switzerland had been recognized (*e.g.* by France) long before it was guaranteed by the Congress of Vienna.

[48] Luxemburg was forced to demolish her fortresses, and is not even permitted to keep an armed force.

[49] The most important historical instances of permanent neutralization usually

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Protectorates and Vassal States. — Baty, *Int. Law in South Africa* (1900), ch. 2; Boghitchévitch, *Halbsouveränität* (1903); * Despagnet, *Essai sur les protectorats* (1896); Engelhardt, *Les protectorats* (1896); * Heilborn, *Das völkerrechtliche Protectorat* (1891); Jenkyns, *British Rule and Jurisdiction beyond the Seas*, ch. 9; Gairal, *Le protectorat international*

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cited are the "free and independent city" of Cracow (1815–1846) and the Congo Free State (1885–1908). The neutrality of Cracow was guaranteed by Austria, Prussia, and Russia. It was annexed by Austria in 1846.

The Congo Free State was not a case of perfect neutralization. At the West African Congress of 1884–1885, Mr. Kasson, the American plenipotentiary, proposed that the territories comprised within the conventional Congo basin be permanently neutralized. After much discussion, the Powers merely agreed (see Arts. 10–11 of the Final Act of the Conference, in Supplement to 3 *A. J.* 14) "to respect the neutrality" of the region on certain conditions and to "use their good offices" to this end. In 1885 the Congo State declared itself perpetually neutral. It will be interesting to observe the effect of the recent (1908) annexation of the Congo Free State by Belgium upon the status of this territory. It is the first example of "a neutralized State holding a colony within neutralized territory." See Reeves on "The Origin of the Congo Free State," in 3 *A. J.*, 99 ff. For numerous references on the Congo, see Bonfils (Fauchille) (5th ed.), notes on pp. 89 and 118–119.

The first historical instance of attempted permanent neutralization was that of the island of Malta, which was declared neutral by the treaty of Amiens (Art. 10) between France and England in 1801–1802. But this treaty was never executed. See Morand, in 1 *R. D. I. P.* (1894), 522 ff.

[50] By a treaty signed at Christiania on Nov. 2, 1907, the leading European Powers agreed to respect the integrity of Norway and to support the Norwegian Government in case this integrity should be "threatened or impaired by any Power whatsoever." This appears to be a case of imperfect neutralization. See Garner, *Introduction to Political Science*, 164.

1896); Pic, in 3 *R. D. I. P.* (1896), 613–647; Pillet, in 2 *R. D. I. P.* (1895), 583 ff.; De Pouvourville, in 4 *R. D. I. P.* (1897), 176 ff.; Sirmagieff, *Des états mi-souverains* (1889); Stubbs, *Suzerainty* (1882); *Wilhelm, in 17 *J. D. I. P.* (1890), 204 ff.; *Ibid.*, in 22 *J. D. I. P.* (1895), 760 ff.

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CHAPTER VII

THE ORIGIN, RECOGNITION, AND CONTINUITY OF STATES

110. **The Origin and Existence of the State.** — It is not within the province of the Law of Nations to deal with the causes of the origin or of the existence and growth of States — a subject which belongs to the province of history and general political science rather than to that of international jurisprudence. It is impossible to lay down juridical rules which shall determine the legality of the existence of an independent political community. The State is an historical and political fact,[1] the creator rather than a creature of law; but it is possible to determine, in a general way, the rules which should govern their recognition by, or admission to, the international community. The most important of these is that they must bear the essential marks or distinguishing characteristics of a State as set forth in the previous chapter.[2]

The State exists independently of its recognition,[3] but some form of recognition is necessary in order to secure its admission into the family of nations. There is, strictly speaking, no *right* to admission,[4] though there are many cases in which recognition cannot long be withheld without danger of serious or embarrassing consequences.

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[1] Jellinek, *Das Recht des mod. Staates* (2d ed.), 265 ff. *Cf. Ibid., Staatenverbindungen.* See also Liszt (3d ed.), § 5, p. 42 n.; 1 Nys, 70 ff; 1 Rivier, 55 ff.; and Ullmann (2d ed.), § 29, p. 123.

[2] See *supra*, § 88.

[3] In 1877 the British governor of Florida made a grant of land within the limits of one of the old thirteen Colonies. Fifty years afterward, the Supreme Court of the United States held that the title to the land in controversy had passed to the United States prior to the date of the grant.

"It has never been admitted by the United States that they acquired anything by way of cession from Great Britain by that treaty of Peace, 1783. It has been viewed only as a recognition of preëxisting rights." . . . *Harcourt* v. *Gaillard* (1827), 12 Wheat. 523, 527. *Cf. McIlvaine* v. *Coxe's Lessee*, 4 Cranch, 209, 212.

[4] Consequently, there is no legal *duty* of recognition. This is the opinion of

111. **Modes of Recognition.** — The members of the international community are such by virtue of original membership in the European family of nations, or their subsequent admission. Recognition of such admission may be tacit or express.

A new State may be tacitly or impliedly recognized by an older State through the conclusion of a treaty, the sending or reception of diplomatic agents, or the establishment of such official relations as indicate an intention to treat it as an International Person.[5] Instances of tacit admission are Russia, the United States, Japan, and China. It is impossible, in some cases, to fix a definite date of admission.

Express or formal recognition may also assume various forms. It may be formal and collective, as in the case of Turkey which was formally admitted to full membership[6] to the society of nations by the Great Powers at the Congress of Paris in 1856. It may also be conditional, as in the case of the Balkan States which were admitted at the Congress of Berlin in 1878 on

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Bonfils, No. 201; Liszt, § 5, p. 43; 1 F. de Martens, § 64; 1 Oppenheim, § 71; and Le Normand, *La reconnaissance internationale* (2d ed., 1899).

But the contrary view is maintained by equally good authorities. See *e.g.* Bluntschli, Art. 3; Hall (5th ed.), 20 and 82; 1 Piédelièvre, No. 122; Pomeroy, § 215; 1 Rivier, 57; and Ullmann, § 30, p. 125 of 2d ed.

The right and duty of recognition seems to be of a moral nature. Several of the authorities (see *e.g.* 1 P.-Fodéré, No. 1144) speak of a theoretical right of recognition which may be ignored in practice.

[5] For example, the flag of the Congo Free State was recognized by the United States in 1884.

It is a disputed question whether the appointment and acceptance of a consul implies recognition. See *e.g.* Hall (5th ed., 88 n. and 320) in the negative and 1 Oppenheim (§ 428) in the affirmative. It would seem from a study of historical instances that the mere appointment of consuls does not imply recognition, but that the granting of an *exequatur* or document authorizing them to act does involve such recognition. The British Government appointed consuls to various South American States at least eighteen months before their recognition by Great Britain, and a number of South American States were recognized by the United States through the issuance of *exequaturs*. See 1 Moore, *Digest*, pp. 79, 90–91. The British consuls continued to perform their functions during our Civil War.

[6] This membership has, however, been somewhat qualified in practice. It can scarcely be maintained that Turkey has been actually treated as a fully sovereign and independent member of the family of nations in all respects. This was the case at least until the recent Turkish Revolution of 1908.

condition[7] that they impose no religious disabilities on their subjects.

Though tacit or express recognition binds only the recognizing State, it practically amounts to a certificate of admission.

112. **The Conditions under which New International Persons may Arise.** — New International Persons may arise in consequence of the following events:

(1) The division of an existing State or International Person into several separate international entities, as in the case of the recent separation of Norway and Sweden,[8] or the successful secession of members of a Federal Union.

(2) The Union of a number of States into a Confederacy or Federal State, as in the case of the United States, the Swiss Cantons, and the German Empire.

(3) The entrance of hitherto barbarous or half-civilized or Oriental States into the international community, as in case of Russia under Peter the Great in the early part of the eighteenth, and of Japan and China[9] in the latter part of the nineteenth century.

(4) The erection of a new State in a region previously uncivilized, as in the case of the Transvaal or South African Republic (1852–1902), the Congo Free State (1884–1908), and Liberia (recognized since 1847).

(5) The formal recognition of new members by international agreement of the Powers, as in the case of the Balkan States in 1878, the Congo Free State in 1885, and of Belgium in 1831.

(6) The recognition of insurgent political communities which have revolted from the parent country.

The recognition of the latter class of communities has given rise to more definite rules and a more regular and consistent practice than in most of the other cases. Consequently, these merit a somewhat extended discussion.

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[7] It appears to be agreed that the violation of such conditions does not render the recognition invalid, for recognition cannot be withdrawn if once given. It might possibly justify intervention or even war in certain cases. It certainly would justify protest, suspension of diplomatic relations, and perhaps reprisals.

[8] As indicated above (p. 103 n.), Norway and Sweden were not wholly devoid of separate international personality prior to their separation, but each State is now a complete International Person.

[9] As in the case of Turkey, it may be questioned whether the membership of China is not somewhat qualified in international practice.

The recognition of insurgent communities may be considered in three successive stages. These will be discussed in turn.

113. (I) **Recognition of Insurgency.** — *A Status of Insurgency* may be recognized when an insurrection with a political purpose has assumed the proportions of a war " in a material sense," and when it seriously interferes with the exercise of sovereignty or with normal foreign intercourse. Though it is held that such a contest (one in which belligerency proper is not recognized) does not amount to civil war " in a legal sense,"[10] it has passed beyond the state of a mere mob outbreak or riot into that of an organized insurrection with responsible leaders, etc.

The recognition of a status of insurgency affects the relations between all parties concerned. Such recognition by the parent State implies the admission of certain rights and duties relating to the conduct of hostilities, as *e.g.* the treatment of combatants as prisoners of war instead of as traitors and pirates.[11] It also probably frees the parent State from a certain measure of responsibility for the acts of the insurgents, and imposes certain obligations upon the latter.

114. **Effects of a Recognition of Insurgency.** — Recognition of insurgency by third Powers implies certain obligations on the part of the latter, such as the enforcement of neutrality laws,[12]

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[10] The distinction between the "recognition of the existence of war in a material sense and war in a legal sense" was made by Chief Justice Fuller in the case of *The Three Friends* (1896), 166 U. S., and Scott, 758. The status of insurgency was also recognized by President Cleveland in his Proclamation of 1895 enjoining a strict observance of our Neutrality Laws during the second Cuban insurrection which broke out in that year. A similar British Proclamation had been issued in the Bahamas during the first Cuban insurrection in 1869. See 1 Moore, *Digest*, p. 242, and the case of *The Salvador* (1870), 3 Privy Council Rep. 218, and Scott, 743. In 1899 the German Consul-general at Cape Town issued a proclamation impliedly recognizing the insurgency of the Boers. See Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*, in John Hopkin's *Studies* for 1908, p. 47.

[11] On the question "Can insurgents be treated as Pirates?" see *infra*, § 214.

[12] See cases of *The Salvador* and *The Three Friends*, cited above. In 1900 the Institute of Int. Law declared that " in case of an insurrectionary movement or civil war, International Law imposes upon third powers certain obligations toward established and recognized governments which are in conflict with an insurrection." The supply of arms, munitions of war, and subsidies to the insurgents is prohibited; and it is especially forbidden to permit the "organization within its territory of military expeditions hostile to established or recognized governments." See 18 *Annuaire* (1900), 227. For Proclamations by President Taft regarding disturbances in Mexico and the export of arms from the United States, see Supplement to 6 *A. J.* (1912), 146–148.

as also certain rights, such as the protection, wherever possible of the lives and property of neutrals, and freedom from search and capture by insurgent vessels.[13] This involves a certain measure of responsibility for both the insurgents and the parent State.

On the other hand, certain rights and privileges are recognized as belonging to the insurgents, as *e.g.* freedom from treatment as pirates, the right to prevent "access of supplies to their domestic enemy"; [14] and it is maintained that "a status of insurgency may entitle the insurgents to freedom of action in lines of hostile conflict which would not otherwise be accorded, as was seen in Brazil in 1893–1894, and in Chile in 1891. It is a status of potential belligerency which a State, for the purpose of domestic order, is obliged to recognize. The admission of insurgency does not place the foreign State under new international obligations as would the recognition of belligerency, though it may make the execution of its domestic laws more burdensome."[15]

Unless recognized as belligerents, insurgents are not supposed to exercise the rights of visit and search, capture of contraband, or to institute blockades.

115. **(II) Recognition of Belligerency.**—A *Status of Belligerency* may be recognized when the insurrection has assumed the proportions of a public civil war in a legal sense, *i.e.* a war waged by insurgents politically organized under a responsible government

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The rights and duties implied in a recognition of insurgency have never been fully determined or officially declared.

[13] See Secretary Hay to Mr. Bridgman, Minister to Bolivia, March 14, 1899, For. Rel. (1899), 105. Cited by 1 Moore, *Digest*, p. 243.

[14] Sec'y Hay to the Sec'y of the Navy, Nov. 15, 1902. Cited by Wilson in article entitled "Insurgency and Int. Maritime Law," in 1 *A. J.*, p. 56. But Mr. Hay adds: "The existence of the power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents." In another connection, he justly observes: "To deny to an insurgent the right to prevent the enemy from receiving material aid cannot well be justified without denying the right of revolution."

[15] Wilson, in the article cited above. Professor Wilson is entitled to the credit of having first called the attention of students of International Law to this important subject and of formulating the law of insurgency; but it has nevertheless been ignored, even by recent publicists.

For the events in Brazil and Chile referred to in the text, see 1 and 2 Moore, *Digest*, §§ 70, 333–334, 1172.

exercising sovereign powers over a definite territory and having the will and capacity to fulfill its neutral obligations. It goes without saying that it must be able to protect the lives and property of neutrals so far as these are consistent with the ends and methods of civilized warfare, the rules of which it is bound to observe.

116. **Effects of Recognition of Belligerency.** — The effect of a recognition of belligerency, which, like the recognition of independence, may be either tacit or express,[16] is to admit the insurgents to all the rights and privileges, and to impose upon them all the duties of a State so far as the conduct of the war is concerned. It confers an international status, though merely for purposes of warfare; but diplomatic relations between neutrals and insurgents should be unofficial or informal in character,[17] and should be strictly confined to matters affecting the private and business interests of the nationals of both parties. Consuls may be sent or may continue to perform their duties among the insurgents when belligerency has been recognized, but no *exequatur* should be granted to a consul sent by an insurgent belligerent community.[18] It goes without saying that there must be no treaties or exchange of diplomatic agents.

Special attention should be called to the fact that recognition of belligerency by third Powers is by no means necessarily or solely to the advantage of the insurgents. To be sure, it may give them moral comfort and support, enable them to float their bonds, etc.; and it permits them to exercise the rights of visit and search, capture contraband, and institute blockades. But the insurgents may not be in as good a position to take advantage of these opportunities as the parent State, which also acquires these same rights and privileges.[19] It should also be remarked that recognition by the parent State does not carry with it the same consequences or indicate the same attitude as recognition by third Powers. The parent State binds itself to treat those recognized as enemies instead of as rebels and pirates, at least until the war is over, and it declines full responsibility for acts of the insurgents. But it does not recognize their neutrality or international status.

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[16] It is now usually express, *i.e.* it occurs through a formal Declaration or Proclamation of Neutrality, such as was issued by Great Britain soon after the outbreak of our Civil War. But authorities are in error when they assert or imply that this has always been the case. The recognition of the belligerency of the South American States was tacitly recognized by the admission of their vessels to the ports of the United States on equal terms with those of Spain. See 1 Moore, *Digest*, § 61. Of course there is no doubt as to which method is preferable. Recognition by the parent States is always tacit or implied.

[17] On this subject, see especially "Acts Falling Short of Recognition," in 1 Moore, § 72.

[18] See *supra*, note on p. 116.

[19] This was notably the case with Spain and Cuba. See Hershey, "The Recog-

117. **History of Status of Belligerency.** — The status of belligerency is a very modern addition to International Law. It was invented during the first quarter of the nineteenth century by the United States and Great Britain, and applied by them to the revolts in Spanish America and Greece; but it is only within a comparatively recent period that the doctrine has been clearly defined, more particularly in connection with the American Civil War and the Cuban Insurrections of 1868–1878 and 1895–1898.

118. **The Tests of Belligerency.** — It is now pretty generally agreed that a justifiable recognition of belligerency rests upon a double basis of law and policy. "The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either party. The relations between the parent State and the insurgents must amount, in fact, to war in the sense of International Law."[20]

"Among the tests are the existence of a *de facto* political organization of the insurgents, sufficient in character, population, and resources to constitute it, if left to itself, a State among nations capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war . . . ; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity."[21]

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nition of Cuban Belligerency," in *Annals Am. Acad. of Pol. and Soc. Science* for 1896, 74 ff.; Moore, in 21 *Forum* (1896), p. 297 f.; Woolsey, *Foreign Policy*, 25 ff.

[20] President Grant, in Special Message of June 13, 1807. See 1 Moore, p. 194.

[21] See Dana's valuable note 15 to Wheaton, pp. 34–39. A portion of this note, which is perhaps the clearest exposition of the law of belligerency ever published, may be found in 1 Moore, *Digest*, § 59, and Snow, *Cases*, 24–27. *Cf.* the first part

The true ground of recognition as a matter of policy is thus stated by another leading authority: " The right of a State to recognize the belligerent character of insurgent subjects of another State must, then, for the purposes of International Law, be based solely upon a possibility that its interests may be so affected . . . as to make a recognition a reasonable measure of self-protection.[22] According to Dana, the only justification for recognition is that the neutral's " own rights and interests are so affected as to require a definition of its own relations to the parties." If not justified by such necessity, " it is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government" ; and premature recognition may be regarded in the light of an unfriendly act,[23] though it should not be looked upon as an intervention.

119. **Historical Examples of Recognition of Belligerency.** — Among the historical instances of recognition of belligerency are those of the various States of Spanish America[24] by the United States and Great Britain during the first half of the nineteenth

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of President Grant's message of 1870 cited above, which is couched in almost identical language. (Dana's edition of Wheaton was published in 1866.)

It should be noted that Dana does not assert that all of the tests must be applied in every case. To insist upon a navy as a *sine qua non* would be equivalent to a claim that war in a legal sense cannot be carried on solely on land. Where it can be applied in conjunction with the others, this test is almost conclusive, although it is not likely that a mere fleet will be recognized, as was shown in the cases of Brazil and Chile in 1893 and 1891. See Lawrence, *Principles* (3d ed.), § 164; and 1 and 2 Moore, *Digest*, §§ 70, 333–334, 1172.

On the proper tests for belligerency, see also the rules adopted by the Institute of International Law, in 18 *Annuaire* (1900), 228; Feraud-Giraud, in 3 *R. D. I. P.* (1896), 277 ff.; Olivart, in 28 *R. D. I.* (1896), 101–103; Rougier, *Les guerres civiles* (1903), Pt. III, chs. 3 and 4; and Wiesse, *Guerres civiles*, § 4.

Some of the publicists are satisfied with much less than are the authorities indicated above. See *e.g.* Bluntschli, Art. 512; Pomeroy, § 224 ff.; 2 Rivier, 213 f.; and Vattel, Bk. III, §§ 293–294. See also Justice Grier, in *The Prize Cases*, 2 Black, 665.

[22] Hall (5th ed.), p. 33. Hall (p. 34) distinguishes three classes of cases in this connection: (1) The case of insurgents isolated in the midst of loyal provinces In this case the question could hardly arise. (2) The case of a State contiguous with a revolted State. Here the presumption of propriety is rather against recognition, but the contiguous State decides whether its "interests will be better secured by conceding or withholding recognition." (3) In the case of maritime warfare, the presumption is in favor of recognition.

[23] See Dana, in note cited above.

[24] See Latané, *The Diplomatic Relations of the United States and Spanish-America*, 56; and Paxson, *The Independence of South American Republics*, 253–264.

century; the recognition of the belligerency of Greece by Great Britain in 1825; that of Texas by the United States in 1836[25]; and that of the Southern Confederacy[26] by Great Britain, France, etc. in 1861. The United States was on the verge of recognizing the belligerency of Cuba[27] in 1869, and again in 1896; but the Executive Department of our Government in each instance refrained from doing so on the ground mainly that a responsible government had not been established.

120. **(III) The Recognition of Independence.** — *The Status of Independence* should not be recognized until the contest between the parent State and belligerent insurgents is virtually decided, and the independence of the latter has been practically established as a matter of fact. As in the case of the recognition of belligerency, there is a double question of law and policy involved. The real questions to be asked and answered are: (1) Is there a *bona fide* contest still going on or has it practically ceased? (2) If the fact of virtual independence has been fully established, is it to the interest of the third Power to recognize the revolted or seceding community as a member of the international com-

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[25] 1 Moore, § 62.

[26] On the famous controversy regarding the so-called premature recognition of the Southern Confederacy by Great Britain, see especially 1 Moore, § 66, and the authorities cited on p. 189. To these should be added Bernard, *Neutrality of Great Britain*, etc., chs. 6 and 7; Bluntschli, in 2 *R. D. I.* (1870), 452 ff.; and Harris, *The Trent Affair.*

It is now generally admitted even by Americans that the recognition of the Southern Confederacy by Great Britain on May 13, 1861, was not premature, though perhaps a trifle hasty. It was fully justified, if not necessitated, by President Lincoln's Proclamation of April 19, 1861, instituting a blockade of Southern ports.

[27] It is known that President Grant was only prevented from taking this step by the opposition of his Secretary of State, Hamilton Fish. That the country was prepared for such recognition may be seen by consulting the Congressional debates of the period. See *Cong. Globe,* 2d sess. of 41st Cong. (1869–1870), Pts. 5 and 6.

In the spring of 1896 the two Houses of our National Legislature passed a concurrent resolution in favor of the recognition of the belligerency of Cuba. Later, the Senate voted a joint resolution of like import. For the voluminous debates on this subject, see *Cong. Record*, 54th Cong., 1st and 2d sess.

On the agitation for the *Recognition of Cuban Belligerency*, see Benton, *Int. Law and Diplomacy of the Spanish-American War*, 36–41; Hershey, in 7 *Annals Am. Acad.* (1896), 450 ff.; Moore, in 2 *Forum* (1896), 288–300; *Ibid.*, 1 *Digest*, § 67; Olivart, in 5 and 7 *R. D. I. P.* (1898), 518 ff., and 575 ff.; Woolsey, *Foreign Policy*, 25 ff.

For further references on *Recognition of Belligerency*, see Bibliography at end of this chapter.

munity?[28] It is not necessary to await recognition by the parent State.[29]

121. **Effects of Premature Recognition of Independence.** — The justice of a cause or sympathy with an oppressed people are wholly insufficient grounds of recognition either of belligerency or independence. Premature or unjustified recognition of independence is a gross affront to the parent State and practically amounts to an intervention in the internal affairs of another nation which may result in war. Such was the recognition of the independence of the United States by France in 1778, which was followed by a declaration of war on the part of Great Britain. Other examples of intervention in the guise of recognition were the recognition of the independence of Greece and Belgium by the Powers in 1827–1830, Cuba[30] in 1898, and Panama[31] in 1903.

122. **Examples of Recognition of Independence.** — Sound precedents bearing on the law of recognition of independence, or cases in which the legal rule was observed, may be found in the numerous recognitions of Spanish American States by the United States and Great Britain in the first half of the nineteenth century; and in the recognition of Texas by the United States in

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[28] See 1 Moore, *Digest*, §§ 30 ff., pp. 87–110, for good statements of the law of the recognition of independence by American statesmen. See *Letters of Historicus* (III) by Sir W. Harcourt for citations from the speeches of British statesmen on this subject.

There is perhaps no rule of International Law respecting which there is greater agreement than that governing the recognition of the independence of insurgent communities.

[29] Thus, the Spanish-American States were not recognized by Spain until many years after their recognition by the United States and Great Britain. Holland was not recognized by Spain until 1648, *i.e.* nearly seventy years after Holland's declaration of independence.

[30] The United States, not wishing to recognize the so-called government of the Cuban insurgents, declared the *people* of Cuba free and independent. On the *Recognition of Cuban Independence*, see Benton, ch. 4; Cameron's *Report* No. 1160, in Senate Doc. of 5th Cong., 2d sess. (38827); Chadwick, *Relations of the U.S. and Spain* (1909), ch. 29; Hershey, in 11 *Annals*, etc. (1898), 353 ff.; 1 and 6 Moore, §§ 40, 1909–1910.

[31] The independence of Panama was formally recognized by President Roosevelt on Nov. 13, 1903, *i.e.* within ten days after the so-called revolutionists had declared their independence. It was virtually recognized within three days after the birth of this Republic. It was really a case of political intervention, only to be justified, if at all justifiable, on grounds of national policy and the "collective interests of civilization."

On the *Recognition of Panama*, see 3 Moore, § 344 for the main documents bear-

1837, one year after Mexico had ceased all attempts to recover her lost territory.[32]

123. **There is no Legal Right or Duty of Recognition.** — Strictly speaking, there is no legal right or duty of recognition, although the new State which has fully established its independence undoubtedly has a strong moral claim to diplomatic intercourse and admission to membership in the family of nations. It should be added that recognition, whether of insurgency, belligerency, or independence, is usually regarded as an executive act, and falls within the prerogative of the Executive Department of the Government.[33]

124. **The Continuity of States.** — It is a cardinal principle of the Law of Nations that changes in the internal government or constitution of a State, as from a monarchy to a republic or a change of dynasty, do not affect its identity or continuity as an International Person.[34] But in case such a change is effected by revolution or violence, other States should be allowed a reasonable time within which to recognize the new government. The same principle applies here as in the case of the recognition of a new State. The new government should show evidence of stability and capacity to carry out its international obligations. In the meantime, however, necessary business may be transacted with the *de facto* or local government, but such business should be of a distinctly non-political character; or, if political, it should not pass beyond the stage of negotiation.[35]

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ing upon the case. See also Hershey, in 16 *Green Bag* (1904), 265–266; Scott (G. W.), in 75 *Outlook* (1903), 947–950; Woolsey, in 16 *Green Bag* (1904), 6–12; Rougier and Viallate, in 11 *R. D. I. P.* (1904), 481 ff. and 567–165; and *Chamberlain, in 195 *No. Am. Rev.* (1912), 145 ff.

[32] On the *Recognition of the Independence of the Spanish-American Republics and Texas*, see 1 Moore, *Digest*, §§ 28–37; Latané, *The Diplomatic Relations of the United States and Spanish America*, ch. 2; Paxson, *The Independence of the South American Republics*; and *Letters by Historicus* (Sir W. Harcourt), I, 3–35.

[33] For a citation and discussion of the American cases, see Penfield, in 32 *Am. Law Rev.* (1898), 390–408. For a fuller citation of cases, see *Jones* v. *United States*, 137 U.S. 202. See Scott, 38–44, for an abridged report of this leading case.

[34] Of course this principle does not apply in cases of a total or partial loss of independence, or in changes which involve the union of several States into one or the division of one State into several. For judicial assertions of this fundamental principle, which is now universally accepted, see *Texas* v. *White*, 7 Wall. 700 and *Keith* v. *Clark*, 97 U.S. 454. For an abridged report of these cases, see Scott, 25–36.

[35] For the practice of the United States, see 1 Moore, *Digest*, §§ 43–58, particularly pp. 120 and 139.

Generally speaking, treaties remain obligatory except in the case of personal or purely dynastic treaties;[36] the financial obligations incurred by the previous government must be paid; property rights, whether public or private, remain unaffected unless alienated or confiscated; and the new government is responsible for wrongs and injuries done to the government or citizens of another State.[37]

The same principles apply where there has been a mere loss of territory. Thus the obligations of Prussia remained the same after she had been deprived of almost one third of her territory by the Peace of Tilsit in 1807.[38] Such loss of territory might, however, be conceivably so great as to make it practically impossible for a State to fulfill its legal obligations. "On the same principle, when a State is extinguished, and its territory incorporated with another State, the continuity of the annexing State and the obligations of its treaties are unaffected, and the treaties of the extinguished State fall to the ground."[39] Thus, upon the "incorporation of the kingdom of Hanover in the Prussian monarchy, in 1860, the Hanoverian treaties of amity, commerce, navigation, extradition, and copyright ceased to exist. They were replaced by the Prussian treaties on the same subjects."[40]

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[36] An example of such a treaty is the Family Compact of 1761 between the king of France and other members of the House of Bourbon. A change in the form of government might also affect political treaties or alliances.

[37] Under the convention of 1831, France finally paid the United States a money indemnity in settlement of claims of American citizens growing out of illegal acts committed by Napoleon I. 1 Moore, pp. 249 and 252. For the full history of the French indemnities paid to citizens of the United States, see 5 Moore, *Int. Arbitrations*, 4399–4459. For the history of the indemnity paid by the king of the Two Sicilies, see 4575 ff. and especially 4576–4581 as to the principle of liability involved.

[38] The same principles would apply where a State had increased its territory. "Even Sardinia, while enlarging its area to nearly four times its original size by the absorption of the rest of the Italian States, and after changing its name to that of the kingdom of Italy, did not consider its indentity to be destroyed, and held its existing treaties to be applicable as of course to the new provinces." Hall (5th ed.), p. 22 n.

[39] 1 Westlake, pp. 59–60. As we shall see in the next chapter (p. 132), the latter part of this statement is too absolute. Not all treaties of the extinguished State are abrogated.

[40] Rivier, 73. Cited by 1 Westlake, 60. Other instances mentioned by Westlake are the extinction of the commercial treaties of England and France with Texas after the incorporation of the State into our Federal Union in 1845, and the abrogation of the Tariff Conventions of England and the United States with Madagascar upon the annexation of this island by France in 1896. For a discussion of the latter case, see Lawrence, *Principles* (3d ed.), Appendix I, 647–651.

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The subject is one which is almost wholly ignored even by recent authorities.

CHAPTER VIII

THE EXTINCTION AND SUCCESSION OF STATES

1. The Extinction of States

125. **Total Extinction.** — A State ceases to exist when it has lost the essential marks or distinguishing characteristics of a State.[1] It may become extinct through voluntary action or as a result of conquest. Theoretically, this might result from natural causes, such as depopulation, extermination, total emigration, or a permanent condition of anarchy. But practically, States are extinguished through voluntary incorporation, forcible annexation, division into several States, or through a union with other States.[2]

Like the recognition of a new State or government, the recognition of a conquest, merger, division, or cession is the recognition of an accomplished fact, and should not be refused after resistance has virtually ceased, or when the old government has practically abandoned its functions. But a reasonable time should be permitted to elapse in order to enable the recognizing State to judge of the permanence and stability of the new condition of affairs, or to determine the capacity of the new State or States to carry out their international obligations. Such recognition is generally tacit.

States fully extinguished lose all international personality, and acquire the rights and obligations of the annexing or incorporating State. The observance of any agreements or promises made by the latter to such annexed or incorporated State is a matter of conscience, or of moral rather than of legal obligation. On the other hand, no purely legal sanction of its extinction can be given by the extinguished State, whether by treaty, by the consent of a representative assembly, or by popular vote (*plebiscite*).

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[1] See *supra*, § 88.

[2] Examples of voluntary incorporation are the Union of England with Scotland and Ireland, and the admission of Texas into the Federal Union of the United States.

History abounds in examples of forcible annexations or cessions and conquests. Recent instances are the annexation of the South African (Transvaal) Republic and the Orange River Free State by Great Britain; and of Porto Rico and the Philippine Islands by the United States.

Instances of division or separation are Belgium and Holland in 1831, and Norway and Sweden in 1905.

Examples of union are the Federal Unions of the United States, Germany, and Switzerland.

126. **Partial Extinction.** — There is a partial loss of international personality when a State loses a part of its external sovereignty or independence, either by placing itself under the Protectorate of a stronger Power, by joining a Confederacy, or by permanent neutralization. Such partial loss of independence may materially affect its international obligations.

2. THE SUCCESSION OF STATES

127. **Universal Succession.** — When one State takes the place of another and undertakes a permanent exercise of its sovereign territorial rights or powers, there is said to be a succession of States.[3] This succession may be called universal in case of total absorption, whether through voluntary agreement, forcible annexation or subjugation, the division of a State into several International Persons, or the union of several States into a single International Person. Universal succession may also be said to exist where a State is broken up and divided among several previously existing States, as in the case of the division of Poland between Russia, Prussia, and Austria.

128. **Partial Succession.** — Partial succession occurs in the following cases: —

(1) When a State acquires a portion of the territory of another through cession or conquest.

(2) When a new State is formed in consequence of a successful revolt or declaration of independence.

(3) When a fully sovereign State loses a portion of its external sovereignty or independence through incorporation into a Federal Union, or places itself under the Protectorate of a stronger Power.

(4) When the latter process is reversed, and the State under Suzerainty or a Protectorate, or the member of a Federal Union, becomes a fully sovereign state.

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[3] On the meaning and propriety of this phrase, see note at the end of this chapter.

I. Universal Succession

129. **Effects of Total Absorption.** — In case of total extinction and absorption or incorporation, the authorities are generally agreed that the annexing or absorbing State succeeds in the main to the rights and obligations of the extinguished State. "The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty." [4]

There is no reasonable doubt that the successor assumes responsibility for the financial obligations, more particularly the public debt, of the extinguished State. The former falls heir to the latter's assets, credits, revenues, and resources subject to the charges or burdens resting upon them.[5] "*Res transit cum suo onere.*" Thus, the United States [6] assumed the public obliga-

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[4] Mr. Adams, Sec. of State, to Mr. Everett on Aug. 10, 1818. 1 Moore, *Digest*, p. 334.

[5] This principle extends to the case of an extinguished government. "It was applied by the English courts to the cotton in England belonging to the Government of the Confederate States, which was held to pass by their overthrow to the United States, subject to such right of account against the latter as the holders of it would have had against the former." 1 Westlake, p. 75. See the *United States* v. *Prioleau* (1866), 2 H. and M. 563, and Scott, *Cases*, 85; *United States of America* v. *McRae* (1869), L. R. 8 Eq. 69; and the *King of the Two Sicilies* v. *Wilcox* (1851), 1 Sim. N. S. 301, 327–336.

An exception to the application of this principle exists where a loan has been contracted for the purpose of the war which results in extinction or absorption. 1 Westlake, 78.

[6] The famous case of the *Texan bonds* is only an apparent exception to this rule. When Texas was admitted to the American Union in 1845, the power to lay and collect customs duties passed to the United States. It was agreed that the vacant and unappropriated lands within its limits were to be retained by the State and "applied to the payment of the debts and liabilities of the Republic of Texas; and the residue of the lands, after discharging the debts and liabilities, were to be disposed of as the State might direct, but in no event were said debts and liabilities to become a charge upon the Government of the United States." 5 *U. S. Statutes at Large*, 798. Cited by 1 Moore, p. 343. Subsequently, in 1850, the United States took over a portion of these lands, and in return for this and other considerations, the United States agreed to pay to Texas $10,000,000, but stipulated that five millions thereof should remain unpaid until the creditors holding Texan bonds for which duties on imports had been specially pledged, should file releases of all claims against the United States.

In 1854, before a final settlement was made, a British holder of a Texan bond brought a claim against the United States for the payment thereof before a mixed commission which had been instituted for the adjustment of claims between the United States and Great Britain. The British and the United States commissioners tions of the former colonies in 1789, the enlarged Sardinia or the new Italy took over the public debts of the lately annexed Italian States in 1861, as did Prussia those of the incorporated German States in 1866.

In case there are several successors, the debt should be rateably divided, preferably in proportion to the revenues and taxable resources[7] of that portion of the divided territory which each receives.

In principle, the absorbing or incorporating State also succeeds to the contractual obligations of the extinguished State, at least as far as the rights of third parties are involved; and, *vice versa*, the contractual rights and obligations of the annexing State extend to the inhabitants and territory of the people absorbed.

There are, however, important exceptions to this rule. It is clear that political (including personal and dynastic) treaties and alliances of the extinguished State fall to the ground. It is equally clear that transitory or dispositive treaties remain in force. Of such a character are stipulations respecting boundary lines, servitudes, or easements resting on the land relating to the use and repair of roads (including railways) or the navigation of rivers, etc. In these cases the rights of third parties, which it would be illegal to ignore or destroy, are involved.

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gave diametrically opposed opinions. The umpire, Mr. Joshua Bates, an American citizen, decided that the commission could not entertain the claim, apparently for lack of jurisdiction.

Whatever the merit of this decision, there can be no reasonable doubt that the United States was bound in equity to pay these bonds. As Dana (note 18 to Wheaton) has well said: "It certainly would not be satisfactory to say that the United States discharges its obligation to the creditors of Texas, to whom her customs were pledged, by paying only the amount of the customs received."

In 1855 Congress passed an act providing that, in lieu of the $5,000,000 payable to Texas in 5% stock under the act of 1850, the Secretary of the Treasury should pay to those creditors of Texas who held bonds for which the revenues of the Republic were pledged, the sum of $7,500,000, to be apportioned among the holders *pro rata*. See 1 Moore, p. 347.

On the *Texan Bond Controversy*, see especially: 1 Calvo, § 101; * Dana's Wheaton, note 18; Lawrence, 1 *Commentaire*, 211 ff.; Magoon, *Law of Civil Government under Military Occupation*, 190–191; * 1 Moore, *Digest*, § 97, pp. 343–347; * 4 Moore, *Int. Arbitrations*, 3591–3594; Scott, *Cases*, 94–96 n.; Snow, *Cases*, 18–20; 1 Westlake, 77–78; Ullmann (2d ed.), 132 n.

[7] The extent of territory and number of the population have also been suggested. These have in a few cases furnished the basis of the division, but they furnish very crude and unsatisfactory criteria.

There is a serious difference of opinion in respect to treaties of commerce, navigation, extradition, etc. According to some authorities,[8] such treaties are extinguished like those of a political alliance or friendship. According to another, but more infrequent, view, " treaties of commerce and other international conventions which bind the annexed State "[9] remain in force. There is a third opinion which considers " a general answer to these questions based on principle, to be impossible and leaves them to the nature and scope of the treaties and concrete circumstances for decision." [10] The better opinion (and the one most consonant with international practice) would seem to be that such treaties may be annulled at the option of the absorbing State. True it is that the rights and interests of third parties are affected; but the interests involved are for the most part economic or quasi-political in their nature, and cannot as a rule resist the pressure of changed social and political conditions.

As in the case of partial succession,[11] the universal successor acquires complete rights of sovereignty over the territory which has been absorbed; and can, therefore, make any change in the laws or political institutions of the extinguished State which it deems necessary or desirable. But civil and criminal law as opposed to constitutional and purely administrative law, and the private rights of the inhabitants of the extinguished State, remain unaltered unless changed by express enactment. Contracts, franchises, and concessions to private companies and individuals should also, as a rule, be maintained. The universal successor also succeeds to the public and private domain of the extinguished State.

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[8] *E.g.* Despagnet, No. 91; 1 Piédelièvre, No. 148; Rivier, pp. 72 ff.; 1 Westlake, p. 67 n.

[9] 1 F. de Martens, p. 369.

[10] Ullmann (2d ed.), p. 132. Cited by 1 Westlake, p. 67 n. Ullmann cites Bluntschli and 1 Calvo, § 100, in favor of this opinion — a view which he himself seems to share in spite of his criticism of it as being "much too eleastic." He claims that the annexing State succeeds to the legal order (*Rechtsordnung*) of the incorporated State, but admits that, in deciding on the question whether such treaties shall be maintained, it (the absorbing State) takes its own interests into account.

[11] See *infra*, p. 137.

II. Partial Succession

130. **Effects of Partial Succession.** — The general rules and principles governing partial succession are practically the same as in the case of universal succession or total extinction and absorption. But these rules may be greatly modified in international practice by considerations of public policy based on the interests of the ceding as well as on those of the annexing States. There is even a greater modification of these principles in the case of a colony or province which has achieved its independence.

The main difference between the two categories of universal and partial succession is that in case of partial succession, whether by cession or conquest, there is a continuity of State life or personality on the part of the State which has lost a portion of its territory. This materially affects international rights and obligations.

In such cases it may be necessary to distinguish between the general rights and obligations of the ceding or dismembered State and the special or local rights and obligations of the inhabitants of the ceded territory. This distinction also applies to the case of a colony or province which has achieved its independence. There may be certain charges or burdens in the nature of servitudes resting upon the land, or the assets, revenues, or resources of the new State or ceded province may have been mortgaged or hypothecated as security for the payment of a portion of the public debt of the ceding or dismembered State.

It is generally agreed that the purely local or personal rights and obligations of the ceded or conquered territory, as also those of the new State which has achieved its independence, remain with the new State or ceded territory. This is particularly true of the public domain, public property such as government railways, and of purely local and personal debts or of any portion of the public debt which may have been contracted in the interest of the new State or ceded province, more particularly for internal improvements.

Many of the authorities[12] maintain that the partial successor must also take over a proportional part of the general public debt of the ceding or dismembered State; but, however equitable and just such an arrangement may be, it cannot be maintained that this is a positive rule of the Law of Nations. There have,

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[12] It is often claimed that this is also the case with debts which are secured by the assets, revenues, or resources of the ceded province or of an insurgent or belligerent community which has won its independence. But the rule would certainly

not apply to a loan thus secured which had been contracted for general purposes, or for the special purpose of waging the war or crushing the rebellion resulting in cession or independence.

The United States in 1898 refused to assume in behalf of Cuba any portion of the so-called Cuban debt, for the payment of which the Cuban revenues were pledged, on the ground that it consisted of a "mass of Spanish obligations and charges," and was "in no sense created by Cuba as a province or department of Spain or by the people of the island." This debt had been mainly contracted "for the purpose of supporting a Spanish army in Cuba," and the creditors "took the chances of the investment" with a full knowledge of the risks involved. "From no point of view can the debts above described be considered as local debts of Cuba or as debts incurred for the benefit of Cuba." 1 Moore, *Digest*, § 97, pp. 351–385. The citations given above may be found on pp. 352, 357, 358, 367, and 368.

There can be no question that the United States acted wisely in refusing to assume for her protégé the major portion of this debt, but Cuba would seem to have been liable in equity for such a portion of the loan as had been spent on internal improvements, such as railways, harbors, etc. See an interesting article contributed by Von Bar to the German periodical *Die Nation* for April 22, 1899. Cited by 1 Westlake, 79 n.

On the *Cuban and Philippine Debts*, see Magoon, *Law of Civil Government under Military Occupation*, p. 187, for a citation from an article by Hon. Whitelaw Reid contributed to the *Anglo-Saxon Review* for June, 1899. Mr. Reid says: "Warned by the results of their inquiry as to the origin of the 'Cuban Debt,'" and having "learned that over one fourth of the Philippine Debt had actually been transferred to Cuba to carry on the war against the Cuban insurgents," the American commissioners at Paris abandoned all idea of assuming the so-called "Philippine Debt." But the United States paid to Spain the sum of $20,000,000 for the cession of the Philippine Islands — an amount which was at least equal to the face value of that debt.

The views of Le Fur on this subject (see 6 *R. D. I. P.* (1899), 615 ff.) are so obviously prejudiced that they are unworthy of serious refutation.

The Spanish Commissioners made much of the fact that the Spanish-American colonies had assumed their local debts (see 1 Moore, pp. 342–343, 355); but the circumstances were very different, and "historically we know that the assumption of said obligations was a price paid by said colonies for independence and recognition of sovereignty." Magoon, *op. cit.*, p. 188.

There are numerous other historical examples of the assumption of purely local debts (see 1 Moore, pp. 339–351, 361), and it undoubtedly amounts to an obligation in International Law.

The following authorities hold that the partial successor should assume a proportional part of the public debt: Bonfils (Fauchille), Nos. 224 ff.; Despagnet, No. 97; 1 Fiore, No. 360; Huber, Nos. 125–135 and 205; 1 Piédelièvre, Nos. 154 ff.; 1 Rivier, 214; Taylor, § 165; Ullmann, § 33. To the contrary may be cited: Bluntschli, Arts. 47–48; Hall (5th ed.), 93 n., 98–99 n.; 1 Halleck 01; 1 Oppenheim, § 84; 1 Pradier-Fodéré, No. 157.

The Ayes thus seem to have it, but it should be noted that a number of them indeed, been a considerable number of historical instances of such division,[13] but the international practice is by no means uniform. If the debt is divided, it should be in proportion to the taxable assets or resources of the new State or ceded province as compared with those of the remaining portion of the dismembered State.

Contrary to the general principle governing in the case of universal succession,[14] all treaties, excepting transitory and dispositive conventions, affecting the incorporated or ceded province fall to the ground in cases of partial succession. This also holds when an insurgent or seceding colony, province, or State has achieved its independence.[15]

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qualify their statement of the law by the use of such phrases as *should*, it is *just and rational*, *theoretically*, etc. This indicates a subjective rather than a positive or objective attitude toward the subject. They evidently endeavor to state the law as they think it *should* be, rather than *as it is* — a frequent fault with Continental publicists.

[13] The main instances of a division of the general public debt prescribed in modern treaties are as follows: —

(1) The assumption by Sweden of a part of the Danish debt upon the cession of Norway by Denmark in 1814. (2) The agreement by France to take over a small portion of the national debt of Sardinia upon the latter's cession of Savoy and Nice in 1860. (3) The apportionment of the Danish debt between Denmark and the ceded duchies upon the annexation of Schleswig, Holstein, and Lauenburg by Austria and Prussia in 1864 and 1866. (4) The assumption by Italy of a part of the Papal debt in 1864. (5) The assumption by Sardinia of three fifths of the Monte-Lombardo-Veneto debt, and of a part of the Austrian national loan of 1854, by the treaty of Zürich in 1859. (6) The division by the Powers of the public debt of the Netherlands between Belgium and Holland in 1839. (7) The obligations imposed by the Powers upon Bulgaria, Servia, Montenegro, and Greece to discharge portions of the debt of the Ottoman Empire in accordance with the treaty of Berlin of 1878. But no part of the Ottoman debt was assumed by Russia on account of her acquisitions in Asia. It may be noted that the two latter instances are examples of a division secured through European intervention rather than by conquest or a treaty of cession. For a few more relatively unimportant examples, see Huber, *Die Staatensuccession*, No. 127.

Among the important recent historical instances where there was no assumption of any portion of the general debt are those of the cession of Alsace-Lorraine by France to Germany in 1871, and of Cuba and the Philippine Islands by Spain in 1898. The United States did not take over any portion of the British debt upon the acknowledgment of her independence by Great Britain in 1783, nor have any of her various acquisitions of territory been charged with such obligations excepting Texas. The Spanish-American colonies appear to have assumed only their local debts.

[14] See *supra*, p. 132.

[15] Thus the United States did not share in either the rights or obligations of British treaties after she had achieved her independence. A long and bitter contro-

"On the cession[16] of territory by one nation to another, those internal laws and regulations of the former designated as municipal continue in force and operation until the new sovereign imposes different laws and regulations." But those "laws which are political in their nature, and pertain to the prerogatives of the former government, immediately cease upon the transfer of sovereignty."[17] The Constitution and laws of the annexing or conquering State do not necessarily extend *ex proprio vigore* to the annexed or ceded territory,[18] which is nevertheless completely subject to the will of its new sovereign.

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versy arose in connection with the fishing rights granted by Great Britain in 1783. The United States claimed that the right to fish on the coast of Newfoundland and on the other coasts of the British dominion in North America was merely a recognition of preëxisting and imprescriptible rights which were not abrogated by the War of 1812. On the other hand, the British justly held that these rights were created by treaty and were extinguished by the war. By the treaty of 1818 the citizens of the United States were merely granted the *liberty* to fish, etc. This constituted a virtual abandonment of the untenable contention that these rights existed independent of treaty stipulation.

On the *Northeastern Fisheries*, see especially: J. Q. Adams, *The Fisheries and the Mississippi* (1828); Elliot, *The United States and the Northeastern Fisheries* (1887); Isham, *The Fishery Question* (1887); Hall (5th ed.), 94–95; Lawrence, *Principles* (3d ed.), § 111; *1 Moore's *Digest*, §§ 163 ff.; Dana's Wheaton, 341–350 and note 142; Wharton's *Digest*, §§ 301 ff.; and the *U. S.* v. *Great Britain* (case of Atlantic Coast Fisheries), in 4 *A. J.* (1910), 948 ff.

[16] The same rule applies, of course, to cases of conquest.

[17] Griggs, Att'y-Gen., in 1 Moore, *Digest*, § 93, p. 310. See also 1 Moore, § 93, p. 310, especially the opinions of Chief Justice Marshall, Lords Mansfield and Ellenborough on pp. 332–333.

[18] See especially the series of decisions known as the "Insular Cases" decided by our Supreme Court in 1901. In the leading case of *De Lima* v. *Bidwell* (182 U. S. 1), it was held that Porto Rico was not a foreign country within the meaning of the tariff laws after its cession, but a territory of the United States. Consequently, the Dingley Tariff Act of 1897, which was exclusively applicable to foreign countries, did not apply to Porto Rico. See also *Fourteen Diamond Rings* v. *United States* (183 U. S. 176), which applied the same doctrine to the Philippine Islands. In *Downes* v. *Bidwell* (182 U. S. 244), it was held that Porto Rico "is a territory appurtenant and belonging to the United States within the revenue clauses of the Constitution; that the Foraker Act (of 1900) is constitutional, so far as it imposes duties upon imports from such islands." In *Dooley* v. *United States* (182 U. S. 222), it was held that duties upon imports from the United States to Porto Rico prior to the ratification of the treaty of peace were lawfully collected under the war power. It is a remarkable fact that the decision in each case represented a bare (but not always the same) majority of one, the vote of the judges standing five to four.

On the *Insular Cases*, see especially: 1 Moore, § 94; 1 Willoughby, *The Const. Law of the U. S.* (1910), §§ 170–171 and ch. 30; and Scott, *Cases*, 667–674, including note on p. 674. For further references, see 1 Moore, p. 331.

Private rights are unaffected by a change of sovereignty. "It is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"[19]

In Cuba and the Philippines the rights of property entitled to protection under the phrase "property of all kinds" (see Arts. I and VII of the treaty of peace with Spain) were believed to include trade-marks and the property rights of municipalities,[20] but they were held not to include rights to public office, whether purchased or inherited.[21]

The annexing State, as also the colony or province which has achieved its independence, succeeds to the public domain of that portion of the ceding or dismembered State which is located in the ceded territory or the new State; but it appears to be some-

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For other cases showing the effect of a change of sovereignty on laws, see Beale, *Cases on the Conflict of Laws* (1900), 65–84. See also Scott, 104–116.

[19] C. J. Marshall, in the leading case of *United States* v. *Percheman* (1833), 7 Peters, 51, 86; and (in abridged form) Scott, 95. Our great Chief Justice also stated that even had the treaty by which Florida was ceded to the United States contained no stipulation safeguarding the property of individuals, their property rights would have been unaffected by the change. In *United States* v. *Soulard* (4 Pet. 511), he had remarked *apropos* of the cession of Louisiana that "the United States, as a just nation, regards this stipulation (viz. that the inhabitants of the ceded territory should be protected in the free enjoyment of their property rights) as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract." For the citation of numerous other cases and expressions of official opinion on this subject, see 1 Moore, § 99.

[20] Magoon, *The Law of Civil Government and Military Occupation*, 305–315, 463–471, 515–545, etc. The rights of property secured by copyrights and patents acquired by Spaniards was specifically protected by Art. XIII of said treaty. 1 Moore, p. 427.

[21] Magoon, 194–209 and 454 ff. See also 1 Moore, § 99, pp. 425–429; and the cases of *Sanches* v. *United States* (1907) and the *Countess of Buena Vista* v. *United States* (1908), in 2 *A. J.* 678–688. For criticism of these decisions, see Bordwell, in 3 *A. J.* (1909), 119–136.

what doubtful as to whether it succeeds to the whole of its private domain or property as well. The better opinion would seem to be that it only succeeds to that portion of the private property of the ceding or dismembered State which is destined for local use. Thus, State-owned railways, telegraph and telephone plants, etc., pass to the annexing or new State;[22] but State loans to corporations or individuals should not, as a rule, be confiscated. In the case of privately owned railroads, the principle of succession only applies to the public rights of regulation or control. In view of the increasing tendency toward State socialism, this subject deserves more attention than it has yet received.

There is a difference of opinion respecting the obligations of the new or annexing State to execute the contracts, concessions, or franchises, etc., granted by the ceding or dismembered State within the ceded territory or territorial borders of the colony or province which has achieved its independence. It would certainly seem that such contracts and concessions should, as a rule, be respected, and this has been the general practice of nations for at least a century;[23] but international practice is by no means uniform, and the rule is not without important exceptions.

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[22] See especially Despagnet, No. 99; 1 Piédelièvre, No. 161; and 1 P.-Fodéré, No. 161.

[23] Such provisions were contained in the treaties of Campo Formio (1797), Paris (1814), Zürich (1859), Paris (1860), London (1864), Vienna (1864), Frankfort (1871), and Berlin (1878). The various treaties by which the United States acquired Louisiana, Florida, and Texas contained similar stipulations. But these provisions have been ignored in several recent cases of cession or conquest, viz. by France in Madagascar (1896), by the United States in the treaty of Paris (1898) with Spain, and by Great Britain in South Africa (1900). 1 Moore, § 98, pp. 385–390, and Gidel, *Des effets de l'annexion sur les concessions* (1904), ch. 11.

The United States of course acknowledged the validity of Spanish contracts and concessions in Cuba, Porto Rico, and the Philippines, which were of a purely local nature or in the exclusive interests of the inhabitants of these islands (1 Moore, p. 406); but it refused to admit a legal obligation to continue payments to the Manila Railway Co., which was a concession with a guarantee of 8 per cent granted by Spain partly in the imperial and partly in the local interest. See 1 Moore, § 98, pp. 395 ff., and Magoon, *op. cit.*, pp. 177 ff. See also Magoon, pp. 529–531, for the opinion of this law officer that the United States was not legally bound to continue the payment of the Spanish subsidy to a telegraph company in the Philippine Islands.

The Transvaal Concessions Commission of 1901, which was appointed by the British Government to inquire into concessions presenting examples of mixed public and private rights granted by the South African Republic, declared: "It is clear that a State which has annexed another is not legally bound to any con-

The general principle which should govern this important but much neglected subject has been correctly stated by a leading Italian authority: "The annexing Government succeeds to the rights and obligations resulting from contracts regularly stipulated by the ceding government in the relative public interest of the territory ceded."[24]

To this rule there seem, however, to be several exceptions. The grant or concession must have been not merely *regularly* obtained or duly acquired, *i.e.* from the proper authority and with a proper observance of legal forms, but it must have been made in good faith.[25] It must not be in violation of a treaty with the annexing or dismembered State nor contracted for the purpose of the war which results in annexation. The concession may also be canceled if the grantee has without lawful excuse failed to fulfill the essential conditions of the grant. The new government is, moreover, justified in canceling or modifying the concession in case it is injurious to the public interest or in conflict with the public order or the fundamental principles governing the legislation or policy of the annexing State. In the various classes of cases covered by the last sentence compensation or indemnity should, however, be made.[26]

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tracts made by the State which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing State refuse to recognize them." In commenting upon these dicta, Westlake (I, pp. 81–82) observes: "The latter dictum is true, since courts of law are bound by the will of the sovereign power of the country, whether that will be just or unjust. The former dictum . . . is to be explained by the narrow meaning which the commissioners evidently attached to the term 'legal' . . ." The Commissioners add: "But the modern usage of nations has tended in the direction of the acknowledgment of such contracts." And, with certain reservations, England appears to have acted on this principle.

In the cases which were brought up for judicial determination, the British Courts declined to assert jurisdiction on the ground that annexation was an act of State, and they held that municipal tribunals lacked authority to enforce contractual obligations alleged to have been incurred by an adversary. The leading cases are those of *Cook* v. *Spring* (1899), A. C. 572; and the *West Rand Central Gold Mining Co.* v. *The King* (1905), 2 K. B. 498. See "Colonial Cases Relating to the Succession of States," in 3 *Zeitschrift*, 618–620, and Westlake, in 17 *Law Quar. Rev.* 392 ff.

[24] 1 Fiore, No. 356, p. 313.

[25] See on this point the instructions of Secretary Root, in 1 Moore, pp. 392 ff., and Magoon, 595 ff.

[26] For the exceptions, see *Report* of the Transvaal Concessions Commission in 1 Moore, § 98, pp. 411–414; and Gidel, *Des effets de l'annexion sur les concessions* (1904), chs. 7–10.

The same principles of course apply to a colony or province which has achieved its independence.[27]

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[27] The authorities are very much divided as to the meaning and propriety of the phrase "succession of States." Several (*e.g.* Gareis, § 16, pp. 59 ff., and Zorn, 32, 77) even deny that it ever takes place, and one (Liszt, § 23) only admits it in a few cases. Others maintain that it is a pure fiction or metaphor, whether useful or otherwise. But the majority accept the doctrine of succession either in pure or modified form.

The Roman idea of succession upon death as the continuation of the person of the deceased by the heir was introduced into the Law of Nations by Grotius who said: "It is undoubted law that the person of the heir, in respect to the continuation of public as well as private ownership, is to be conceived as the same with the person deceased" (lib. II, cap. 9, § 12). This view was adopted by Pufendorf and Vattel, but denied by the commentator Cocéji, who claimed that the Grotian doctrine of succession was a fiction based upon a principle of Roman private law which is inapplicable, in all its content, to International Public Law. On the views of Cocéji, see Gidel, *op. cit.*, pp. 35 and 57 ff.

Among the publicists who hold more or less strictly to the Grotian doctrine of succession are: Despagnet, Nos. 90 ff.; Hall, 99; 2 Halleck, 495; 1 F. de Martens, § 67, pp. 368 f.; and 1 Rivier, 70 ff.

The following authorities are among those who hold to the doctrine of succession in modified form: Bluntschli, Arts. 50, 54, and 55; 1 Calvo, §§ 99 ff.; 1 Fiore, No. 355; Heffter, § 25; 1 Oppenheim, §§ 80 ff.; 1 P.-Fodéré, Nos. 158 and 160.

Among the publicists who evidently consider the phrase "succession of States" a mere fiction or metaphor are Appleton, Gabba, and Gidel, who have produced valuable monographs on this important subject. But Huber, the most important of them all, does not hesitate to use the phrase "Staatensuccession" as the title of his remarkable work. It must be admitted that these monographs are, for the most part, highly abstract and theoretical, and that their conclusions are often at variance with international practice. Thus Appleton (p. 51) holds that the annexed or extinguished State still continues to exist in spite of its loss of sovereignty; and Gidel (chs. 3 and 4) bases his theory of "continuity" upon the right of the occupant. He claims that cession is a recognition rather than a source of rights. The views of Max Huber, although highly abstract, are more reasonable and are largely based upon a study of international practice. He declares (p. 18): —

"The notion of succession is a general one in law, and belongs exclusively neither to private nor to public law. Succession is a substitution *plus* continuation. The successor steps into the place of the predecessor and continues his rights and obligations; so far the succession of private and public law agree. But we now have to

cc. 9 and 10; * Hall (5th ed.), 91–99; 1 Halleck (3d ed.), 90–92; Hartman, §§ 12–13; Heffter, §§ 24–25; Holtzendorff, in 2 *Handbuch*, 33–43; * Huber, *Die Staatensuccession* (1898); Larrivière, *Des conséquences des transformations territoriales des États sur les traités anterieurs* (1892); Lawrence (4th ed.), § 49; Liszt, § 23; 1 F. de Martens, §§ 66–69; * 1 Moore, ch. 4, §§ 92–99; 1 Nys, 399–401; * 1 Piédelièvre, Nos. 134–200; 1 Phillimore, Pt. II, chs. 5–6; * 1 Oppenheim, §§ 79–84; 1 P.-Fodéré, Nos. 156–163; * 1 Rivier, 65–75, 213 ff.; Selossé, *Traité de l'annexion au territoire français et de son démembrement* (1880); * Scott, *Cases*, 85–116; Snow, § 9; Taylor, §§ 163–168; Ullmann (2d ed.), §§ 31–34; 1 Westlake, 59–83; Wheaton, §§ 28–32; 1 Wharton, § 5; Woolsey, § 38.

distinguish between those kinds of succession. A civil successor who steps into the place of his predecessor steps into his rights and obligations as though he were himself the predecessor. That is the universal succession of private law in the human sense, at least according to the prevailing doctrine. But the successor of international law steps into the rights and obligations of his predecessor as though they were his own." Cited and translated by Westlake, I, p. 69.

For an excellent review of the authorities, see Gidel, *Des effets de l'annexion sur les concessions* (1904), ch. 2.

CHAPTER IX

THE ESSENTIAL RIGHTS AND DUTIES OF STATES

131. **Their Nature.** — Until recently, authorities were generally agreed that there exist certain essential or fundamental rights and duties of States which underly the positive rules and customs of International Law. These rights (to which are attached corresponding duties) are usually described as primary, inherent, absolute, fundamental, essential, permanent, etc. They were formerly identified with natural rights and formed part of the so-called law of nature. Some publicists now regard them as moral rather than legal principles, and a few even deny them altogether.[1] But these rights have, in fact, a broader and deeper significance than the ordinary positive rules of the Law of Nations of which they are in large measure the ultimate basis or source, and have even greater obligatory force. Though far from absolute and not inherently unchangeable, they are in the nature of controlling or fundamental principles based upon conditions essential to State existence and international life in our time.

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[1] For example, Cavaglieri, in 18 *R. D. I. P.* (1911), 261; * Heilborn, *System*, 279–306; Jellinek, *System*, 302 ff.; 1 Oppenheim, § 112; and 1 Westlake, 293 ff.

Jellinek considers the fundamental rights of States tautological, and Heilborn's main argument appears to be that they lack sanction or are included under other categories. But the lack of sanction is not greater than in the case of many of the more positive rules of International Law. The fact that authorities are not fully agreed on the content of the fundamental rights and duties of States is no proof of their non-existence. Oppenheim says he agrees with the publicists cited above, but he admits these rights and duties under a different name.

The most suggestive treatment of this question is by Pillet, in 5 *R. D. I. P.* (1898), 66 ff., 236 ff.; but many of his suggestions are too tentative for acceptance in a textbook.

Some of the older publicists adopted the Thomasian classification of perfect and imperfect rights and duties. This division is now generally abandoned. See 1 Westlake (153, 285, 288) for a modern instance of adherence to the doctrine of imperfect rights.

I. The Right of Self-preservation

132. **The Right of Self-preservation.** — The most important of these fundamental rights of States is that of existence, which involves the rights of self-preservation and defense. To this right there is attached the corresponding duty of respecting the existence of other States. The right of self-preservation takes precedence, in a sense, of all other rights and duties, and is more than a right in the ordinary use of this term. It is a principle which underlies all positive rules and customs, and is based upon an instinct which in the last resort controls all living organisms.

A State has unquestionably the right, under modern conditions, to make such preparations and to take such measures as it may deem necessary for its own safety and defense, but it has no right to make a disposition of its forces or assume an attitude threatening to the existence or safety of another State. It is also bound to use due diligence or the means at its disposal to prevent organized conspiracies or military preparations against a friendly State on its own soil, as also to forbid the direct use of its territory and resources for hostile purposes. In short, it is under obligations to preserve a strict and impartial neutrality between warring Powers.

The right of self-preservation[2] includes the right to preserve the integrity and inviolability of its territory with the corresponding duty of respecting that of other States. In order to protect and preserve this right, it may in extreme cases of necessity[3] commit what would ordinarily be an infraction of the Law of

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[2] Some publicists (*e.g.* Bonfils, No. 243; Chrétien, Nos. 187 ff.; 1 Pradier-Fodéré, Nos. 219 and 261; and 1 Rivier, 265–268) also include the right of progress or perfectibility, *i.e.* the development of power, resources, etc., but these are certainly not legal or positive rights.

[3] The excuse of necessity is denied by Bonfils, No. 242; 1 Mérignhac, 246 f.; 1 Piédelièvre, No. 207; and 1 Westlake, 297 ff.

It is admitted by Grotius, lib., c. II; §§ 6–10; Hall, Pt. II, ch. 7; Heffter, § 30; 1 Phillimore, Pt. III, ch. 10; 1 P.-Fodéré, Nos. 220–234; 1 Rivier, 277–279; 1 Twiss, § 102; and Vattel, liv. II, c. 9, § 119.

The excuse of necessity may, as some publicists assert, be theoretically unsound and practically dangerous (being liable to abuse); but, as Pradier-Fodéré (I, p. 367) observes: "This theory, however admirable for saints and heroes, is not made for common humanity;" or, as Westlake (I, 307) remarks in another connection: "Laws are made for men and not for creatures of the imagination."

Nations and violate the territorial sovereignty or international right of another State, as was done, *e.g.* by England through the seizure of the Danish fleet in 1807,[4] by Canada in the case of the *Caroline*,[5] by Spain in the case of the *Virginius*,[6] and by Japan

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[4] The seizure of the Danish fleet by England in 1807 to prevent its falling into the hands of Napoleon has been almost unanimously condemned by Continental writers. Naturally it has been upheld by British publicists like Hall (268 f.) and Westlake (I, 302 f.). Surely an American is capable of rendering an impartial verdict. See the comments of Captain Mahan (*Influence of Sea Power upon the French Revolution*, II, 277), who justifies the seizure. This so-called act of "piracy" or "brigandage" appears to have been wholly justifiable. See also Rose, *Life of Napoleon*, II, 129 ff.; *Ibid.*, *Napoleonic Studies*, 133–152.

[5] During the Canadian insurrection in the winter of 1837–1838, the American steamboat *Caroline*, was being used by Canadian insurgents and their American sympathizers to transport recruits and military supplies from Schlosser, N.Y., on the American side of Niagara River, to Navy Island, the headquarters of the insurgents. This island, through which ran the boundary line between Canada and the United States, was located in the midst of the Niagara River. It was believed that the *Caroline* would also be used to transport the expedition from Navy Island to the Canadian shore. On the night of Dec. 29, 1837, she was seized by Canadian forces at Schlosser, N.Y., and set adrift over the Niagara Falls. It appears that only two persons were killed.

In the course of the correspondence between the American and British Governments which followed the arrest and imprisonment in 1841 of McLeod, one of the supposed British participants in the seizure of the *Caroline*, on a charge of murder, Daniel Webster, then Secretary of State, laid down the rule which Lord Ashburton admitted was applicable to the case.

Webster contended that to justify the conduct of the Canadian authorities, England must show a "necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation . . ." as also that the "local authorities of Canada did nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it." Professor Westlake (I, p. 300) justly remarks: "This was good law, except as to the emergency's leaving no moment for deliberation."

It should be added that reparation by way of apology or idemnity should always be promptly made for such violations of territorial sovereignty or international rights. Lord Ashburton expressed regret that an explanation and apology for this "violation of territory" had not been made immediately.

On the case of the *Caroline*, see especially 2 and 7 Moore, *Digest*, §§ 217 and 300. See also 3 *Ibid.*, *Int. Arbitrations*, 2419 ff.; Gen. Scott, *Autobiography*, I, 305–317; Hall, 270–271; Lawrence (3d ed.), *Principles*, § 249; Snow, *Cases*, 177–178; and 1 Westlake, 300 f.

[6] The case of the *Virginius* is more doubtful. The *Virginius* was the property of Cuban insurgents and was employed in aid of the Cuban rebellion against Spain during the Ten Years' Insurrection (1868–1878). Registered as an American vessel and carrying the flag of the United States, she was captured by the Spanish man-of-war *Tornado* about ten or fifteen miles from the coast of Jamaica on October 31, 1873. The pursuit had begun and ended on the high seas.

The *Virginius* was taken to Santiago de Cuba, where, after a summary trial by court-martial, fifty-three of her officers, crew, and other persons on board (includin the invasion of Korea and Manchuria at the outbreak of the Russo-Japanese War.

II. THE RIGHT OF INDEPENDENCE

133. **The Right of Independence.** — The second essential right of States is that of sovereignty, or autonomy and independence. This right involves the corresponding duty of respecting the autonomy or internal sovereignty and the independence or external sovereignty of other States, and it results from that liberty or freedom from restraint which is a necessary condition for the exercise of State activity. As indicated in a previous chapter, this independence or external sovereignty is far from absolute or unlimited;[7] it is a question of degree, and should be measured by the amount of liberty which it is needful or desirable that a State should have in order properly to perform its functions — international as well as national.

134. **Rights flowing from Sovereignty and Independence.** — The following are the most important of the rights flowing from that of sovereignty, or autonomy and independence: —

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ing Americans, Englishmen, and Cubans) were condemned to death and executed as pirates. The remainder were held as prisoners and afterwards surrendered to the United States. Mr. Williams, the Attorney-General of the United States, gave it as his opinion that the *Virginius* "was as much exempt from interference on the high seas by another power, on that ground, as though she had been lawfully registered."

As agreed upon, the vessel was afterwards delivered to the navy of the United States with the American flag flying; but owing to proof by Spain of her fraudulent registry, the salute to the flag was dispensed with. Spain also paid to the United States an indemnity of $80,000.

The British Government also demanded and obtained compensation for the families of the executed, but did not complain of the seizure of the vessel, which it evidently regarded as justifiable on the grounds of necessity or self-defense. This seems to have been the correct view. It is also the view of Taylor (§§ 404 ff.), Woolsey (§ 214), and Westlake (I, 167 ff.). Hall (267 and 275 ff.) is doubtful.

Of course the plea of necessity or self-defense can in no wise be extended to the execution of the prisoners. That was a gross and unwarranted outrage. The charge of piracy was absurd. One is surprised to see this charge justified to a degree in Scott's *Cases*, p. 322 n.

On the case of the *Virginius*, in addition to the authorities cited above, see especially 2 Moore, *Digest*, pp. 895 ff., 967 ff., 980 ff.; Chadwick, *The Relations of the United States and Spain*, chs. 16 and 17, pp. 314 ff.; and De Olivart, 4 *R. D. I. P.* (1897), 611 ff.

[7] For the main restrictions on independence or external sovereignty, see *supra*, ch. 6, § 95.

(1) To establish, maintain, and change its own constitution or form of government and select its own rulers. This implies the right of social and political revolution, even if effected by violent means.[8] Unless such revolutions become chronic and fail to afford reasonable protection to the lives and property of foreigners, other States have no right to intervene for the restoration of order or the institution of a stable and responsible government.

(2) To negotiate and conclude treaties and alliances which are not in violation of International Law, and to maintain diplomatic intercourse with other members of the international community.

(3) To make and change its own laws, subject to the qualification that these should be in conformity with the rules and principles of the Law of Nations. A sovereign State has especially the right to make rules and regulations regarding religion, restrict or prohibit immigration, etc. — rights which are sometimes denied.

(4) To administer its own laws and create its own administrative machinery.

(5) With some exceptions, to be noted hereafter,[9] to exercise exclusive jurisdiction over all persons and things within its territory.

(6) Without violating the rights of others or prohibiting international intercourse, to frame its own policies, more especially those of a commercial nature.

135. **Intervention.** — The right of sovereignty or autonomy and independence implies the duty of non-intervention in the internal and external affairs of other nations by forcible means.

The subject of forcible intervention,[10] which may be defined as

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[8] It is impossible for any one who believes in progress to agree with those authorities who maintain that it is permissible to crush revolutions which threaten the security of other States by reason of their ideas or principles.

[9] See *infra*, §§ 166, 209, 211, 270 ff., 287 ff.

[10] Armed or forcible intervention should be distinguished from mere diplomatic intervention which is unaccompanied by a threat or the use of force. Such interposition usually takes the form of notes addressed to a foreign government in which grievances are stated, claims urged for injuries or non-payment of obligations, or protests made against alleged wrongs, bad treatment, or unjustifiable conduct.

Intervention should also be carefully distinguished from the following acts: 1) Mediation or the use of good offices between States on the verge of or during hostilities. 2) Purely defensive measures by way of preparation for war. 3) Measures of retorsion and reprisal which are essentially retaliatory in their nature. 4) Mere intercession or friendly advice. 5) Alliances showing an intention to assist dictatorial (*i.e.* as implying the use or threat of force) interference in the affairs of another nation, is one of great difficulty and complexity. This arises from the fact that nowhere else within the wide range of international relations does there exist such an apparent conflict between political theory or fundamental principles on the one hand and actual international practice on the other.

136. **The Principle of Non-intervention.** — The whole modern or Grotian system of International Law rests upon the doctrine of the legal equality and independence of sovereign States. This doctrine presupposes full liberty of action on the part of each sovereign within his own sphere or jurisdiction, and non-interference in the internal or external affairs of other sovereigns. The principle of non-intervention is, therefore, a necessary corollary of the doctrine of the equality and independence of sovereign States and must be considered a fundamental principle of International Law.

But International Law is supposed to rest upon international practice as well as upon fundamental principles; and when we examine the actual practice of nations, more especially that of the Great Powers during the nineteenth century,[11] we find numerous examples of armed intervention on all sorts of grounds and pretexts.

or coöperate in case of war. 6) War itself — a status to which intervention often leads, but which it may be intended to avoid.

The intervening State may, however, use the various coercive means which are applicable in war, such as the occupation of a port, or the seizure of a strategic position, etc. Or it may prefer measures of self-help which fall short of war, as an embargo, pacific blockade, etc. Often a mere veiled threat has the desired effect.

Recognition of the independence of a revolted community, if premature, may be a disguised intervention. Recognition of belligerency, even if premature, does not amount to an intervention.

[11] During antiquity intervention was the rule rather than the exception. The history of the Roman Republic is that of a long series of interventions. Under the Roman Empire, intervention lost its significance as an act of interference in the affairs of foreign nations, and acquired the character of a legal and legitimate exercise of the generally recognized sovereignty of Rome.

In the absence of anything like the city-states or the great Empires of the ancient world on the one hand or of the nations and states-system of the modern world on the other, we can scarcely speak of intervention in the proper sense of this term in connection with the history of the Middle Ages. But it should be noted that Popes, Emperors, Kings, feudal lords, etc., were continually interfering in one another's affairs. The wars of religion of the sixteenth and seventeenth centuries afforded new pretexts for intervention.

137. **Classification of Interventions.** — Broadly speaking, interventions may be thus classified: —

(1) Interventions on grounds of morality or humanity, *i.e.* to put an end to great evils and acts of injustice, such as gross forms of cruelty and oppression, religious persecution, needless effusion of blood, danger of race extermination, etc.

(2) Interventions on grounds of policy or interest, *e.g.* to maintain the Balance of Power, to prevent the spread of political heresy, to crush dangerous revolutions, to advance the general welfare or the collective interests of civilization, etc.

(3) Interventions on so-called legal grounds, for the sake of self-preservation, to prevent or terminate an illegal or unjustifiable intervention by another State, in pursuance of a right to intervene granted by treaty or to enforce treaties of guarantee, for the protection of the lives and property of nationals of the intervening State, and to secure the enforcement of rights guaranteed by treaty or International Law.

138. **Intervention on Legal Grounds.** — Authorities have always differed widely on what constitute *legal* or *justifiable* grounds for intervention, or, indeed, as to whether any such right exists. The only approach to unanimity is in respect to intervention for the sake of self-preservation, which, be it observed, is not, properly speaking, a right or law in the ordinary sense of these terms as applied to positive rules and regulations,

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The publication of Machiavelli's *Prince* in 1513 undoubtedly contributed to the frequency of the practice of intervention during the centuries which followed. He recommended intervention in war on the ground of self-interest alone, and characteristically advised his Prince never to remain neutral in any war in which his neighbors might become involved, inasmuch as "it is always more advantageous to take part in the struggle."

On the contrary, Grotius set up the principle that the mere possibility of being attacked does not justify intervention, though he admitted that the aggrandizement of another State may operate as a *casus belli* in a war which is otherwise just. He urged the neutral State to "do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war" — a position which obviously falls far short of the modern view of the obligations of neutrality. Grotius, however, set up the principle of justice and equity as opposed to the Machiavellian doctrine of self-interest as the guiding star through the troubled sea of international relations. See *The Prince*, ch. 21; and *De jure belli ac pacis*, lib. III, cap. 17, § 3.

These two principles may be said to have striven for mastery ever since the days of Machiavelli and Grotius. For further facts bearing on the history of intervention, see *supra*, ch. 4.

but a fundamental right or principle which underlies and takes precedence of all systems of positive law and custom. To justify intervention on this ground, the danger must, of course, be direct and immediate, and not merely contingent or remote.[12]

Aside from the need of self-preservation, the only cases in which intervention may be said to be in a sense legally justifiable are the following: —

(1) In pursuance of a right to intervene granted by treaty, or to enforce treaties of guarantee provided these do not stipulate for the maintenance of a particular dynasty or a particular form of government in the State to which the guarantee is applied.[13]

(2) To prevent or terminate an illegal intervention on the part of another State, as in the case of the United States against the French in Mexico in 1865. It cannot be maintained that this is a duty as well as a right, for States cannot afford to spend their strength and resources in redressing wrongs unless their interests are seriously involved.

(3) To protect the lives and property of the nationals of the intervening State, and to secure the enforcement of important rights granted by treaty or recognized by the Law of Nations. Intervention in these cases should, however, always be diplomatic in character, and forcible means should never be employed unless as a last resort.[14] Mere danger of injury to the lives or property

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[12] The seizure by England of the Danish fleet in 1807 (cited in note 4) is a good example of intervention on the ground of self-preservation or imminent danger.

The numerous interventions for the preservation of the Balance of Power in Europe are often used to illustrate this same principle. But many of them were mere pretexts, and it is generally difficult, if not impossible, to determine in a given case whether and to what extent the principle of self-preservation was involved. Certainly in most cases the danger was remote rather than immediate. These should be classed as political interventions.

[13] Such stipulations in a treaty of guarantee are probably null and void, inasmuch as they constitute a denial of one of the essential rights of independence. See especially Milanovitch, *Des traités de guarantie* (1888), 37 ff.

[14] Art. I of the Second Hague Convention (1907) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts declared: —

"The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

"This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any agreement (*compromis*) from being agreed on, or, after the arbitration, fails to submit to the award."

This same principle should be applied to all claims of a pecuniary nature.

of foreigners affords no ground for intervention, inasmuch as aliens, unless in case of discrimination against them, can claim no special exemption from the ordinary risks run by nationals during times of riot, insurrection, or civil war.

139. **Intervention on Moral and Humanitarian Grounds.** — International practice also admits other exceptions to the rule of non-intervention, on moral or political grounds. Forcible interference in the internal affairs of another State has been justified on grounds of humanity in extreme cases like those of Greece, Bulgaria, and Cuba, where great evils existed, great crimes were being perpetrated, or where there was danger of race extermination. The humanity of our time, combined with an increasing desire for justice and a growing consciousness of interdependence and international solidarity, will doubtless make such interventions more frequent in the future than they have been in the past.[15] But to prevent their being used as mere pretexts, interventions on grounds of morality and humanity should be collective in character, *i.e.* there should be at least several participants, or if one nation intervenes, it should act as the agent or mandatory of the others.

140. **Interventions on Political Grounds. The Balance of Power and the Monroe Doctrine.** — There remains for consideration intervention on political grounds. The leading Powers of Europe have always maintained a "set of primary interests," for the maintenance of which they have not scrupled to intervene whenever occasion demanded. In the seventeenth and eighteenth centuries they frequently combined to preserve the Balance of Power — a system based upon the idea of an equilibrium of forces. Endangered by Louis XIV, this system was revived by the Peace of Utrecht in 1713. Temporarily destroyed by Napoleon I, it was restored at the Congress of Vienna in 1815. In the name of the so-called "Holy Alliance,"

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[15] For example, with our present knowledge of the causes of disease, it can hardly be supposed that States would hesitate to intervene, if necessary, in order to prevent the spread of a disease like cholera.

The time may be not far distant when nations will not hesitate to use their power of intervention to prevent or terminate an unnecessary or unjustifiable war by insisting on arbitration or some other peaceful method of adjusting their disputes. They would be justified in doing so because of the injurious effects of modern war on commerce as well as on grounds of humanity.

the Quadruple Alliance, formed at Paris, Nov. 20, 1814, undertook to prevent and to crush revolution in Italy and Spain, and even threatened to extend its activities to the Western Hemisphere. It was mainly against the extension of this system of intervention to Latin America that the Monroe Doctrine was proclaimed in 1823,[16] a doctrine which also included a declaration that the American Continent was not open to further colonization. The Monroe Doctrine has since been more fully developed, and, in its existing form, may be defined as the prohibition of any further acquisition, colonization, or permanent occupation of American territory by any European Power.

141. **The European Concert of Powers.** — In the course of the nineteenth century, the European idea of a Balance of Power gradually developed into that of the European Concert — a sort of loose Confederacy of five or six of the leading Powers whose members now usually interfere jointly or collectively in matters which are deemed of paramount importance. They have thus intervened in the affairs of Holland and Belgium, Greece, etc., but their principal field of activity has been the Ottoman Empire, where their interventions have been so constant and frequent as to create, in the opinion of some publicists, a body of jurisprudence which is part of the public law of Europe.

Toward the close of the nineteenth century they attempted to extend their system to the Far East, but encountered the diplomatic opposition of the United States and the armed resistance of Japan.

It should especially be noted that the whole fabric of European supremacy in Asia and Africa rests upon this system of political intervention — a policy which the Powers are now beginning to apply jointly or collectively instead of severally, as was formerly the case.

142. **The Primacy of the United States in America.** — A political Primacy, similar in kind, though of a less positive character, is wielded by the United States on the American Continent. It is a Primacy essentially political in its nature

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[16] For references on the Monroe Doctrine, see *supra*, p. 73. For Bibliographies on the Monroe Doctrine and American Diplomacy, see Gilman's *Monroe* (1888) in Am. Statesmen Series, 269 ff.; and Hart, *Foundations of American Policy*, 248 ff.

which has no legal basis whatsoever, but which rests upon certain maxims enunciated by the fathers of the Republic and applied by American statesmen. Based originally upon the principle of non-intervention in the affairs of Europe, the Monroe Doctrine is essentially a system or policy of intervention derived from our conception of primary or permanent American interests.

With one exception,[17] the United States has confined its interventions to American affairs. The most notable instances have been the intervention against the unjustifiable interference of Napoleon III in the affairs in Mexico in 1865; the intervention on grounds of humanity and American interests in behalf of Cuba against Spain in 1898; and the premature recognition of the independence of Panama (really a disguised intervention) by President Roosevelt in the "interests of collective civilization" and of the United States in 1903.

143. **Collective Intervention.** — Theoretically, intervention on political grounds should likewise be collective. It is actually becoming so in Europe, where the Great Powers usually act in concert in the solution of European problems. But the Monroe Doctrine forbids European intervention in American affairs, and no Concert of Powers has thus far been developed on the American Continent.

144. **The Doctrine of Non-intervention.** — The present tendency among publicists[18] is toward the acceptance of the

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[17] The participation of the United States in the intervention of the Powers against China during the great Boxer Uprising of 1900. The protests of Secretary Hay and President Roosevelt against the treatment of the Jews in Roumania and Russia in 1902 and 1903 were not interventions in the proper sense of this term. One is surprised to see Mérignhac (*Traité*, II, p. 299 and n.) so characterize them.

[18] The principle of non-intervention appears to have been first put forth by Kant in his Essay on Perpetual Peace published in 1795. "No State should interfere in the constitution or government of another State." Art. 5. In 1798 Washington wrote to Lafayette to the effect that no government should interfere in the internal affairs of another government, unless it acted in the interest of its own security. See 2 Nys, *Int. Law*, 187. For the attitude assumed by France during the Revolution, see *supra*, § 66. But owing to the reaction which followed, little headway was made in securing support for the principle of non-intervention before the Revolutions of 1830 and 1848, except in the United States and England. In 1821 and 1823 Lord Castlereagh and Mr. Canning laid down the English doctrine that intervention is only to be justified on grounds of necessity, *i.e.* danger to "immediate security or essential interests." The fiasco of Napoleon III in Mexico (1861–1866) seems to have aided in discrediting the doctrine of the right of intervention still prevailing on the Continent at that time.

principle of non-intervention as the correct and normal rule of international practice. But most of them admit intervention as a legitimate exercise of sovereign power in extreme and exceptional cases on high moral or political rather than on purely legal grounds, as, *e.g.* in case of the commission of great crimes against humanity (Greece, Bulgaria, Armenia, and Cuba), or where essential and permanent national or international interests of far-reaching importance are at stake (Ottoman Empire in 1865, or Panama).

It seems necessary to admit another class of exceptions to the rule of non-intervention. The application of this important principle in its fullest extent is necessarily limited to fully sovereign States and to nations which possess governments capable of maintaining a fair degree of order and of affording reasonable protection to the lives and property of foreigners. Whether such States as those of Central America, with all their boasted sov-

Among modern publicists who either deny a right of intervention or accept the principle of non-intervention (with or without exceptions), the following may be cited: Bluntschli, Arts. 68, 474–480; Brocher de la Flechére, in 26 *R. D. I.* (1894), 415–431; * Bonfils (Fauchille), Nos. 295–324; Bourgeois, in 4 *R. D. I. P.* (1897), 746 ff.; Bry, Nos. 96 ff.; Carnazza-Amari, in 5 *R. D. I.* (1873), 352–389 and 531–561; Despagnet, Nos. 193 ff.; 1 Halleck (3d ed.), 95 ff. and 512 ff.; Heffter (Geffcken), §§ 44–46; 1 Fiore, Nos. 569 ff; Geffcken, in 2 Holtzendorff, 131–168; De Floecker, *De l'intervention* (1896), ch. 2, § 3; Funck-Brentano et Sorel, *Précis*, 212–216; * Kebedgy, *De l'intervention* (1890), ch. 2, pp. 39 ff.; Liszt, § 7, pp. 60 ff.; 1 F. de Martens, § 76; 1 Mérignhac, 284 ff.; Neumann, § 14; 2 Nys, 182–193; 1 Piédelièvre, Nos. 289 ff.; * 1 P.-Fodéré, Nos. 287 ff., especially 355; * Rivier, 389 ff.; * Rougier, *Les guerres civiles*, Pt. III, chs. 1 and 2, pp. 315–370; Vattel, liv. IV, §§ 54–62; Walker, *Manual*, §§ 5–7; *Ibid.*, *Science*, 112, 151; Wheaton, §§ 63–71; Wilson, § 23; Wilson and Tucker, § 41; Woolsey, § 43.

Several of the authorities cited above (De Floecker, Funck-Brentano et Sorel, Piédelièvre, and P.-Fodéré) deny the legal character or validity of the principle of non-intervention, as well as that of intervention. The majority hold that the correct rule of International Law is non-intervention, but that intervention is either legally or morally permissible in extreme cases. Even those authorities who appear to admit a legal right of intervention (*e.g.* Arntz, in 8 *R. D. I.* (1876), 675 ff.; * Amos, *Remedies for War*, 75–81, 139–162; Creasy, 278–296; * Hall, Pt. II, ch. 8; * Lawrence, Pt. II, ch. 1; Kebedgy, *op. cit.;* * 1 Oppenheim, §§ 134 ff.; 1 Phillimore, Pt. IV, ch. 1; 1 Westlake, 304–308) restrict its application as much as possible.

On the right of collective intervention, see especially Hall (6th ed.), 287 ff., 188 ff. and 281 ff.; Dumas, *Les sanctions de l'arbitrage*, 166; Horning, in 18 *R. D. I.* (1886), 188 ff. and 281 ff.; Rolin Jecquemyns, in 8 *R. D. I.* (1876), 295, 673.

For divers views and instances of intervention, the student is especially referred to 1 Calvo, §§ 110–207; 6 Moore, *Digest*, ch. 19; 3 Moore, *Int. Arbitrations*, 2313–2447; 1 P.-Fodéré, Nos. 287 ff.; and 1 Wharton, *Digest*, 45–72.

ereignty, are capable of affording such a degree of order and protection is, to say the least, very doubtful.

145. **The Nature of Intervention.** — Like war, intervention is not, commonly or strictly speaking, a law or a right in the ordinary legal sense of these terms, although, like war, it may become a source of legal rights and duties. Like war, it is really an exercise of sovereign or high political power — a right inherent in sovereignty itself. The government which intervenes performs a political act. "It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law;"[19] but which is usually either a justifiable exception to the ordinary, everyday rule of non-intervention or an act based upon the mere possession of physical force. Inasmuch as a sovereign who chooses to exercise this supreme political power cannot be restrained except by the counter use of force, it may become necessary for another or other interested sovereigns to assert a similar political power and intervene against such unjust or injurious act of intervention.[20]

III. THE RIGHT OF LEGAL EQUALITY

146. **The Right of Legal Equality.** — The third essential right of sovereign States is that of equality before the law. All independent States, however weak or powerful, have the same legal rights and obligations.[21] To this right there attaches the corresponding duty of respecting the legal equality of other States. This principle, which is almost universally admitted,[22] is a necessary consequence of the fundamental right of sovereignty

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[19] *Letters by Historicus* (1863), p. 41.

[20] Considerable portions of the text on intervention are drawn from the following articles to which the student is referred for a fuller exposition of the author's previously expressed views on this subject: "Intervention and Recognition of Cuban Independence," in 11 *Annals of the Am. Academy of Social and Political Science* (1898), 353 ff.; "Justification for Intervention," in 31 *Review of Reviews* (1905), 199 ff.; "The Calvo and Drago Doctrines," in 1 *A. J.* (1907), 26, 45; and "The Situation in Nicaraugua," in 68 *Independent* (1910), 74.

[21] From the rules of equality and independence must be excepted half-civilized and part-sovereign States together with those under Suzerainty and Protectorates.

[22] This principle is denied or doubted by a few leading authorities: Lawrence, *Principles* (3d ed.), § 134; *Ibid.* (4th ed.), §§ 112 ff.; 1 Lorimer, p. 170; Pillet, in 5 *R. D. I. P.* (1896), 70 ff.; 1 Westlake, 308–309; *Ibid.*, *Chapters*, ch. 7.

and independence. As Vattel[23] said: "A small republic is no less a sovereign State than the most powerful Republic." Or, as Chief Justice Marshall expressed it: "Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."[24]

Each sovereign State has also the right of selecting such arms and flags, etc., and of conferring upon its rulers such rank and titles as it chooses, though it cannot always insist upon their recognition by other States. Though their influence varies greatly, all members of the international community have one vote and one vote only at International Congresses and Conferences where[25] the vote of the weakest State counts equally with that of the strongest.

There still exist, however, certain differences of rank between States which have not wholly disappeared from international practice. Monarchies and great Republics enjoy what are called *royal honors*, which entitle these States to the exclusive and reciprocal privilege of sending diplomatic agents of the first rank (ambassadors) with rights of precedence and a certain priority of rank.[26]

Because States differ greatly in political power and influence, it does not follow that they are unequal in legal rights and obligations. Just as there is a natural and artificial inequality between individuals whose evil effects are visible even in the administration of justice, so there are natural and artificial inequalities between States which are sometimes shown in a violation of the rights of the weak by the powerful.

Moreover, as pointed out previously,[27] the Concert of the six

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[23] Preliminaries, § 18.

[24] The *Antelope* (1825), 10 Wheaton, 66, 122. *Cf.* Sir Wm. Scott, in the *Louis* (1817), 2 Dod. 210, 243.

[25] To avoid questions of rank and precedence, the principle of the *alternat* has often been used. *E.g.* in signing documents, certain Powers alternate, in such a manner that each Power occupies the first place in the list of signatures, in the copy which it receives. The alphabetical device was employed at the recent Hague Conference, *i.e.* the Powers signed as they were seated — in alphabetical order.

It is of interest to note that, though the French language is usually employed at these Conferences, each State has the privilege of using its own language.

[26] The monarchical chiefs of these States also address each other as brothers.

[27] *Supra*, §§ 141–142.

Great Powers in Europe and the United States in America assert and maintain a sort of Primacy or Hegemony. These are facts of vast importance and significance, but their leadership is political in character and has no legal basis whatever. Neither the United States nor the Great Powers have any definite rules of conduct, they have no permanent organization or machinery, their action in any given case is by no means certain. They deal with each particular situation as it arises from political motives and by political methods.

It may have seemed to some publicists a few years ago that "Europe is working round again to the old notion of a common superior;"[28] but such important social and political events as the rise of modern Japan, the Turkish and Chinese Revolutions, and the Hague Peace Conferences have tended to discredit such prophecy.

IV. The Right to Respect

147. **The Right to Respect.** — From the rights of sovereignty and equality flows a fourth fundamental right of States — the right to respect.[29] A failure to observe the forms of respect due a sovereign State is usually regarded as an affront to its dignity, and may entail serious consequences. It involves the duty of a reciprocal observance of certain rights and ceremonial forms. These include diplomatic privileges, — a topic which will be considered in a subsequent chapter,[30] — the observance of a certain etiquette in diplomatic intercourse, and the use of the customary military and maritime ceremonials between armies or between vessels, and between vessels and forts belonging to different States.[31]

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[28] *E.g.* Lawrence (3d ed.), *Principles*, § 134. For a recent attack on the principle of the legal equality of States, see Hicks, in 2 *A. J.* (1908), 530–561. But legal equality does not necessarily imply equality of voting power, as Mr. Hicks appears to think.

[29] Some publicists speak of a right of reputation in this connection. This is obviously absurd.

[30] See *infra*, ch. 17.

[31] These ceremonials have no longer the importance they had in the days when they implied pretentions to supremacy over portions of the high seas. As far as the open sea is concerned, they are mere matters of courtesy. But States may require the observance of certain maritime ceremonials within territorial waters.

For details regarding the rules of *Military and Maritime Ceremonial*, the student

The right to respect is especially held to include: (1) Respect for a State's moral and political personality as represented by its sovereigns, warships, and diplomatic agents. This is shown by paying the customary honors and marks of respect. Besides, a State may not appropriate the flag, arms, etc., nor copy the emblems or inscriptions found on the coins of another State. (2) Respect for its civil or legal personality. Unless there is well-grounded suspicion of a denial or gross perversion of justice, full faith and credit should be given in each State to the judicial proceedings of other States.[32]

V. THE RIGHT TO COMMERCE OR INTERCOURSE

148. **The Right to Commerce or Intercourse.** — The fifth essential right and duty of States is that of mutual commerce or intercourse. These result from the interdependence and solidarity of the intellectual, social, and economic interests of modern peoples; and include various forms of modern intercourse, more especially diplomatic and commercial relations.[33] It is perhaps rather a necessary condition for modern progress and development than a right in the legal sense of this term,[34] but it is at least an open question whether the violation of the most rudimentary of these rights is not a serious violation of the Law of Nations. For example, a breach of diplomatic intercourse is apt to be followed by war, and a total prohibition of the imports of a particular nation would certainly be regarded as an unfriendly act. To be

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should consult: * 1 Calvo, §§ 231–259; De Cussy, liv. I, tit. II, §§ 61–63, and liv. II, ch. 19, §§ 1–6; Davis (3d ed.), 128–131; Despagnet, No. 171; * 1 Halleck, ch. 5, §§ 16–28; Heffter, § 197; Klüber, §§ 117–122; G. F. de Martens, §§ 158–159; * 1 Ortolan, liv. II, ch. 15; * 2 Phillimore, Pt. V, ch. 5; 1 Pomeroy, ch. 8, §§ 255–257; * 2 P.-Fodéré, Nos. 549–594; the U. S. Army Regulations of 1895, the U. S. Navy Regulations of 1896, and the Queen's Regulations and Admiralty Instructions of 1879.

[32] The question has been much debated, *apropos* of the *Zappa Affair* (which led to a breach of diplomatic relations between Greece and Roumania in 1892) whether one State may inherit real property in another State which prohibits the acquisition of such property by foreigners. For bibliography of the *Zappa Affair*, see Bonfils (Fauchille), p. 157 of the 5th ed.

[33] It would also seem to include the innocent use of postal and telegraphic facilities, and a right to the innocent use of rivers, etc., for purposes of trade and travel.

[34] In one sense the right of intercourse is certainly a legal right, *i.e.* as against third Powers. No State has the right to interfere in the commerce between two States.

sure, a State might conceivably refuse all diplomatic and commercial intercourse with the outside world, but by such action it would cease to be a member of the family of nations. A member of the international community may use its taxing power to levy custom dues which are practically prohibitory; it may favor one State and discriminate against another by means of treaties of commerce and navigation; it may refuse to all foreigners or those of a particular nationality the rights of trade and settlement; it may close certain of its ports to foreign commerce or prohibit foreign trade in certain articles. But it may not refuse all trade with foreign nations or with a particular people; it may not refuse the protection of its courts to foreigners whom it admits within its territory; it accords a certain measure of protection to its own nationals on foreign soil; and it must permit the passage of foreign merchantmen through its maritime belt and international passageways, as also the innocent use of its territorial waters, at least by coriparian States.

It will thus be seen that the right of mutual commerce or intercourse is far from absolute. It is limited by other essential and fundamental rights which take precedence or restrict its application.

VI. The Right of Jurisdiction

149. **The Right of Jurisdiction.** — One of the essential or fundamental rights of a State flowing from territorial sovereignty is that of jurisdiction over practically all things and persons on its territory.[35] By virtue of its personal supremacy or sovereignty, it may, in addition, exercise a limited jurisdiction over its nationals traveling or residing in foreign lands, who are thus subject to a double or concurrent jurisdiction. Some States even wrongly claim the right to punish aliens for certain crimes committed abroad.[36] A State also has jurisdiction over all its vessels (including all persons and things thereon) on the high

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[35] For exceptions to this rule, see *infra*, §§ 166, 209, 211, 270 ff., 287 ff.

[36] The claim of many States to jurisdiction over aliens for certain crimes committed in foreign countries cannot be too strongly condemned, for it is a dangerous abuse of power and cannot be justified on any theory. It is contrary to the principle of territorial sovereignty as well as that of personal supremacy. In the famous *Cutting Case* in 1866, the United States refused to admit the validity of the Mexican

seas, and any State may punish piracy. Finally, in time of war, belligerent States or communities may exercise the rights of visit and search, capture and confiscate contraband goods, and institute and enforce blockades, etc. These matters will be considered more in detail in subsequent chapters.

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For references on *Intervention*, see *supra*, p. 154 n.

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law under which an American citizen was convicted for a libel on a Mexican published in Texas.

On this case and subject, see Gamboa, in 22 *R. D. I.* (1890), 234–250; Hall (6th ed.), 207–210; Lawrence, *Principles* (4th ed.), § 104; 2 Moore, §§ 200–202 (including Moore's admirable *Report* on the Cutting Case); Rolin, in 20 *R. D. I.*, 557–577; Snow, *Cases*, 172–174; Taylor, §§ 191–194; Wheaton, § 113; 1 Westlake, 251–253.

CHAPTER X

RESPONSIBILITY OF STATES

150. **International Delinquencies.** — For a failure to observe its international obligations, as also for a positive violation of the rights of other members of the international community, a State is internationally responsible.[1] Such act of commission or omission may be called an International Delinquency.[2]

A State is *directly* responsible for its own actions or for acts of its officials[3] and agents performed at its command or acting under its authority.[4] State acts which violate International Law

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[1] Some publicists of the positive or historical school still teach the false and dangerous doctrine that a State is the sole judge of its international responsibilities. But the fact that a State is sovereign or that there is no general or permanent International Court of Justice ready to pronounce sentence for an infraction of the Law of Nations does not free a State from international responsibility or make it the sole judge of its international actions.

[2] "International Delinquencies" should be distinguished from "Crimes against the Law of Nations" and "International Crimes." "Crimes against the Law of Nations" are such acts against foreign States as are pronounced criminal by Municipal Law. The phrase "International Crimes" refers to such outrages against mankind as piracy and slave trading, which every State has the right to punish. See 1 Oppenheim, § 151.

International delinquencies should also be distinguished from unfriendly or merely discourteous acts.

[3] This responsibility is to States rather than to individuals. In International Law, the individual as such has neither rights nor obligations other than those belonging to him as a citizen or subject of a member of the Family of Nations.

On the "Theory of International Responsibility of States for Injuries Suffered by Foreigners," see especially two articles by M. Anzilotti, in 13 *R. D. I. P.* (1906), 5–29 and 285–309.

[4] This principle applies particularly to diplomatic and administrative officials and military and naval commanders. It does not fully apply to judicial functionaries, for these are more or less independent of the executive in all well-regulated modern States. "All therefore that can be expected of a government in the case of wrongs inflicted by the courts is that compensation shall be made, and if the wrong has been caused by an imperfection in the law of such kind as to prevent a foreigner from getting equal justice with a native of the country, that a recurrence of the wrong shall be prevented by legislation." Hall (6th ed.), 215.

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or inflict injuries upon other nations constitute serious international delinquencies, if committed wilfully or as a consequence of culpable negligence. Such acts should be promptly disavowed, an apology tendered, and their authors punished.

151. **Direct *versus* Indirect Responsibility.** — In ordinary times a State is also *indirectly* responsible for the orderly and law-abiding conduct of all those residing or domiciled (including foreigners) within its jurisdiction and subject to its laws. It is bound to use due (*i.e.* reasonable) diligence or the means at its disposal to prevent injurious acts against other States on the part of its own nationals or of foreigners residing on its territory. For an international delinquency of this sort, due satisfaction and reparation should also be made. But the punishment of the offenders or payment of an indemnity to those injured is usually deemed a sufficient satisfaction in these cases.

In case of inability to agree upon proper terms of settlement, the dispute should be referred to a board or court of arbitration. If arbitration be refused or satisfaction denied, recourse may be had to one of the means of self-help described in a subsequent chapter.[5]

152. **General Principle of Responsibility for Injuries to Foreigners.** — The general principle governing the responsibility of States for acts injurious to foreigners within its own jurisdiction is that a State is bound to furnish the same degree and kind of protection to foreigners and provide the same means of redress or measure of justice that it grants to its own nationals; but that ordinarily (*i.e.* in the absence of special privileges conferred by treaty or municipal law) foreigners are not entitled to a greater degree of protection or better guarantees of justice than are afforded to a State's own citizens or subjects.[6]

A State is not responsible for the utterances of members of Parliament or legislative and representative bodies.

[5] See *infra*, ch. 22.

[6] This principle, although it is not wholly without exceptions, is generally admitted to be an undoubted rule of International Law. Upon it is based the famous *Calvo Doctrine*, which condemns intervention (diplomatic as well as armed) as a legitimate method of enforcing any or all private claims of a pecuniary nature, at least such as are based upon contract or are the result of civil war, insurrection, or mob violence. "To admit in such cases the responsibility of governments, *i.e.* the principle of indemnity, would be to create an exhorbitant and fatal privilege essentially favorable to powerful States and injurious to weaker nations, and to

153. **The Rules governing the Responsibility of States in Respect to Foreigners.** — In attempting to secure redress or justice, foreigners must, in the first instance, have recourse to the local or territorial tribunals of the district in which they are domiciled, or, as Vattel put it,[7] to the "judge of the place." Judicial remedies should, as a rule, be exhausted before resorting to diplomatic interposition as a means of obtaining redress.[8] But this rule does not apply in cases of gross perversion or evident denial of justice, where judicial action is waived, where the acts complained of are in themselves violations of treaty or of International Law, or where there is undue discrimination against foreigners on the part of the authorities.[9] It "does not apply to countries of imperfect civilization, or to cases in which prior proceedings show gross perversions of justice." [10]

The question of the liability of a State for injuries to the persons and property of foreigners resulting from mob violence is one in which the people of the United States should be deeply interested. Whether due to the intensity of feeling engendered by race and labor problems or (as is more likely) to a lax enforcement of the law resulting from cumbrous and antiquated legal methods of trial and procedure, the American custom of lynching shows little sign of abatement and is not likely to disappear until the causes which lead to it are removed.

154. **The Practice of the United States.** — The rule which has generally been verbally maintained by American statesmen

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establish an unjustifiable inequality between nationals and foreigners." 3 Calvo, § 1280. *Cf.* 1, 3, and 6 Calvo, §§ 205, 1271–1297, and § 256 of Vol. 6.

This doctrine is undoubtedly sound in principle, but subject to certain exceptions. It has been incorporated, though in too absolute a form, into some of the constitutions and into many treaties by Latin-American States.

The broader *Calvo Doctrine* should be distinguished from the narrower *Drago Doctrine* which merely forbids the forcible collection of public debts — a doctrine equally sound in principle and wise as policy, but which its author, the eminent Argentine statesman, Señor Drago, supported by the erroneous and in part obsolete contention that "it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it."

For references on the *Calvo and Drago Doctrines*, see *infra*, p. 331.

[7] Liv. II, ch. 8, § 103. *Cf.* ch. 6, §§ 72 and 73.

[8] 6 Moore, *Digest*, § 987. *Cf.* 2 Wharton, § 241.

[9] For examples of such exceptions, see 6 Moore, §§ 913–914, 986–993, 1021; and 2 Wharton, §§ 230 and 242.

[10] Secretary Evarts in 2 Wharton, *Digest*, p. 695.

appears to have been first laid down by Daniel Webster upon the occasion of the riots at New Orleans and Key West in 1851, which resulted in the summary execution of a number of American filibusters in Cuba. While admitting that the Spanish consul (whose office had been attacked and furniture destroyed)[11] was entitled to indemnity, he maintained that those Spanish subjects who had been injured in person or property were not entitled to compensation, on the ground that many American citizens suffered equal losses from the same cause and foreigners are merely "entitled to such protection[12] as is afforded our own citizens." As a mark of courtesy and out of respect to the magnanimity of the Queen of Spain (in liberating American prisoners), Congress nevertheless granted compensation to Spanish subjects as well as to the Spanish consul for losses sustained during these riots.

History has repeated itself in respect to a number of claims made by foreigners for injuries resulting from mob violence in the United States from that day to this. In the majority of these cases, our Government has refused to admit liability in principle, but has granted compensation as a matter of grace or favor, or from a sense of sympathy, benevolence, or policy.[13] Some of our statesmen, however, admit liability in case of a failure on the part of the local authorities to use due (*i.e.* reasonable) diligence in preventing or punishing such crimes, and this is unquestionably the rule of International Law.[14]

On the other hand the United States has shown commendable zeal in protecting its citizens from such attacks abroad. It has repeatedly interposed diplomatically in behalf of its citizens in China, Turkey, Mexico, Panama, Chile, Brazil, and other Central and South American States.[15]

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[11] The archives of the consulate had been thrown into the street, the portrait of the Queen of Spain defaced, and the Spanish flag torn to pieces.

[12] 2 Wharton's *Digest*, § 226, p. 601. *Cf.* Moore, § 1023, pp. 812–813. See also Snow, *Cases*, 181–183.

[13] This was notably so in the cases of the 43 Chinese killed and wounded at Rock Springs, Wyoming, in 1885; and of the Italians lynched at New Orleans in 1891. For these and numerous cases, see 6 Moore, § 1026.

[14] This rule is usually stated in language ascribed to Secretary Evarts: "A government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed." See 2 Wharton's *Digest*, p. 602. But the absence of quotation marks in Wharton and a reference to Evarts's dispatch as given in 6 Moore's *Digest* (pp. 817–818) shows that Mr. Evarts did not use the language which has been ascribed to him. It is, however, a good statement of an undoubted principle of the Law of Nations if we add the words — "and which it fails to punish." The fact that our Federal Government has sometimes been unable to secure justice for foreigners by reason of constitutional or statutory limitations does not free it from international responsibility in such cases.

In view of this double inconsistency — that of theory and practice on the one hand, and our attitude at home and abroad on the other — it is highly desirable that our State Department should in the future frankly admit liability in all cases of attack by mobs upon foreigners as such or upon those of a particular nationality whenever the local authorities show themselves unwilling or unable to use reasonable diligence to prevent, and whenever the courts are unable or unwilling to punish, such crimes. For foreigners have an undoubted right to demand better protection against this species of violence than is afforded by our courts and local authorities in some parts of this country.

But it may be urged that the admission of such a principle might, in some cases, give to foreigners a protection superior to that enjoyed by our own citizens. This may be true in countries like our own where life and property are insecure from mob violence and where criminal procedure is notoriously defective; but civilized States are supposed to grant at least a fair or average degree of such protection in ordinary times, and it is no adequate reply to a charge of denial of justice to,[16] or an undue discrimination against, foreigners to urge that our own citizens frequently suffer similar or even greater injustice. There would, of course, be no responsibility in the case of an ordinary miscarriage of justice, where the spirit as well as the forms of the law had been complied with, or in the case of one accidentally killed or injured in the course of a riot or insurrection.[17]

In view of the protest by Japan in 1906 against the segregation of Japanese school children in San Francisco,[18] it should be noted that a State is under no obligation to extend to foreigners the enjoyment of civil and private rights or to place them upon an equal footing with its own nationals in these respects. Whatever rights or privileges of this kind (whether of an educational, economic, or religious nature) foreigners may enjoy are based upon convention or the principle of reciprocity, or are granted as a matter of grace and favor.[19] All that an alien who is permitted to set foot on foreign territory (and this permission is purely optional) can demand as a matter of strict right in the absence of privileges granted by treaty, is protection of life and property together with access to the local courts for this purpose.

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[15] 6 Moore, *op. cit.* For our diplomatic activity in China, see the extremely able communication of the Chinese minister Cheng Tsao Ju to Secretary Bayard on pp. 822–826.

[16] On what constitutes a denial of justice, see especially Anzilotti, *op. cit.*, pp. 21–23; 6 Moore, §§ 913 and 986; 2 Wharton, § 230; and Vattel, liv. I, ch. 18, § 350.

[17] See, *e.g.* the case of *Bain*, in 6 Moore, § 1027.

[18] On the *Japanese School Question*, see especially Barthelemy, in 14 *R. D. I. P.* (1907); *Chronique*, 636 ff.; Baldwin, in 7 *Columbia Law Review* (1907), 85 ff.; Hershey, in *Am. Pol. Sci. Rev.* (1907), 393 ff.; and Secretary Root, in 1 *A. J.* (1907), 273 ff.

155. **Responsibility for Injuries to Foreigners during Civil War and Insurrection.** — The same principles may, in general, be said to apply to cases of injuries or losses sustained by foreigners during civil war and insurrection; but the law of necessity or the physical inability (*force majeure*) to furnish adequate protection under such circumstances usually absolves governments from responsibility in these cases. The general rule is that " a sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control." They are " not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. . . . By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of that domicile." [20]

This dispute was primarily a question of treaty construction and constitutional law (the extent of the treaty-making power in the United States); but it was contended that the right of education was included under the right of residence granted by the treaty of 1894 on reciprocal terms, and this may be considered a question of International Law as well as treaty construction. There seems to have been no warrant for this contention.

In the paper cited above, Secretary Root maintained that under the treaty, the State of California might decline to furnish all aliens with school privileges, but could not discriminate against those of a particular nationality in the use of her public school system. There appears to be no other authority for this view, whether regarded as a principle of treaty construction or a rule of the Law of Nations. The theory of "undue discrimination" has been applied to the responsibility of a State for the *protection* of foreigners, but I am not aware that it has been extended beyond this duty. There is much, however, which might be said in its favor.

[19] On this head see especially Anzilotti, 13 *R. D. I. P.* (1906), 18–20.

[20] 2 Wharton's *Digest*, § 223, pp. 577–578. *Cf.* 6 Moore, § 1032, p. 885.

These principles have been repeatedly enunciated by our leading statesmen,[21] as also by those of Europe,[22] and they have the almost unanimous sanction of leading authorities on International Law. Almost invariably they have been applied by European States in their relations with each other, though frequently ignored in their dealings with weaker States, more particularly in the cases of China, Turkey, and the Republics of Latin America.

156. **Exceptions to General Principles.** — There are, however, several exceptions which must be made to the general principles laid down in this chapter. Indemnity would seem to be due to foreigners by way of exception in the following cases: (1) Where the act complained of is directed against them because they are foreigners, or as belonging to some particular nationality. (2) Where the injury results from an act contrary to the laws or treaties of the country in which the act is committed, and for which no redress can otherwise be obtained. (3) When there has been a serious violation of International Law, more especially of the rules of civilized warfare. (4) In cases of a gross violation or an evident denial of justice, or of undue discrimination against foreigners on the part of the authorities.[23]

157. **Claims based on Contract.** — There is another class of claims, viz. those based upon contract, which have given rise to much controversy. These consist mainly of loans and investments which have been guaranteed by a defaulting government. The question is here not so much one of responsibility (for the responsibility of a State is conceded in these cases) as of the means by which such claims may be enforced. Though the authorities who discuss this question are divided in their opinions, the majority of them appear to be opposed to their forcible collection, except possibly as a last resort.[24]

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[21] For numerous opinions of American statesmen, see 6 Moore, §§ 1032–1049. *Cf.* 2 Wharton, §§ 223–226.

[22] See especially the notes of Prince Schwartzenburg (Austrian) and Count Nesselrode (Russian) in reply to certain claims of the British Government which were based upon injuries to British subjects during the revolutions in Tuscany and Naples, in 1848. Cited by 1 P.-Fodéré, § 205, pp. 343-345, and 6 Moore, pp. 886–887.

[23] See especially 6 Moore's *Digest*, §§ 912 ff., 986 ff., 1010 ff., 1019 ff., 1022 ff., 1032 ff., 1040, and 1044 ff.; and the rules adopted by the Institute of International Law (1900), in 18 *Annuaire*, 254–256. *Cf.* 6 Moore, pp. 953-954; and P.-Fodéré § 1366, p. 237.

[24] The right of a State to use coercive measures in the collection of public debts

It is argued, on the one hand, that the public faith — the so-called "honor of the prince" — is particularly engaged in case of contracts of this nature, inasmuch as a government cannot be sued without its own consent; that creditors may have no other means of redress than that of appealing to the State to which they owe allegiance; that stock in the public debt even if held by an enemy is exempt from seizure and its interest payable even in time of war; and that States, being in legal theory free and independent and owning no common superior, each State may enforce its rights at its own discretion by any means whatsoever.

On the other hand, it is urged that hazardous loans and investments should be discouraged; that those making them usually do so with a full knowledge of the risks incurred and in the expectation of exceptionally large returns; that the natural penalty of a failure on the part of a State to fulfill its obligations is a loss of credit; that foreigners cannot hope to be preferred to native creditors; that coercive measures for the collection of bad debts are never or seldom employed except against weak States and are likely to be employed as a pretext for aggression or conquest; and that "it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it.[25]

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is asserted, *e.g.* by Hall (6th ed.), 276; 1 Halleck (3d ed.), 105 ff.; 2 Phillimore, Pt. V, ch. 3; 1 Rivier, 272–273.

The right is denied with or without reserves by 1 Calvo, § 205; Despagnet, No. 208 *bis* of 4th ed.; Kebedgy, in 1 *R. D. I. P.* (1894), 261; F. de Martens, in 19 *R. D. I.*, 386; Moulin, *La doctrine de Drago*, 99–129; 2 Nys, 225; Politis, *Les emprunts d'État*, 217 ff.; 1 P.-Fodéré, No. 405; Rolin-Jaequemyns, in 1 *R. D. I.* (1869), 145 ff.; and 1 Westlake, 317–320.

For the opinions of ten leading publicists on this question, see 35 *R. D. I.* (1903), 597–623.

[25] Señor Drago in the note referred to above, p. 163 n. But this argument is based upon an erroneous and partly obsolete view of the nature of sovereignty.

The views of British and American statesmen are not in complete harmony upon this subject, although the general policy of Great Britain and the United States had been substantially the same, except for the British interventions in Mexico, Egypt, and Venezuela, and those of the United States in San Domingo and Central America.

The English view, as stated by Lord Palmerston in 1848 and reaffirmed by Lord Salisbury in 1882 and by Premier Balfour in 1902, is that financial intervention, though legally permissible, is inexpedient. It is a question of policy rather than of law. For the text of Lord Palmerston's circular, see Hall (6th ed.), 276–277 n.; and 2 Phillimore, Pt. V, ch. 3.

In 1907 the Second Hague Peace Conference laid down a principle which, although not agreed to by all the States represented there, may be regarded as the present rule of International Law on this subject. The Contracting Powers agreed not to have recourse to armed force for the recovery of contract debts unless in case of a refusal to arbitrate or failure to submit to the arbitral award after arbitration had been agreed upon.[26]

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In habitually refraining from diplomatic as well as forcible intervention to secure the payment of public and contract debts, the United States appears to have been influenced by respect for what it believes to be a principle of the Law of Nations as well as by policy or expediency. For the views of American statesmen, see 6 Moore, §§ 916, 995–998. *Cf.* 2 Wharton, §§ 231–232.

But exceptions have been made in cases where diplomacy furnished the only means of redress, as in case of the non-performance of a government contract, arbitrary confiscation of vested rights, or of annulment of charters or concessions. For examples, see 6 Moore, §§ 918, 996–997, and 2 Wharton, § 232.

"International commissions have frequently allowed claims based on the infraction of rights derived from contracts where the denial of justice was properly established." 6 Moore, p. 718.

In his Message of Dec. 4, 1906, President Roosevelt admitted that "the non-payment of public debts may be accompanied by such circumstances of fraud and wrongdoing or violation of treaties as to justify the use of force." See Hershey, "The Calvo and Drago Doctrines," in 1 *A. J.* (1908), p. 40, from which article the major portion of this chapter has been drawn.

[26] For the text of Art. I of this Convention, see *infra*, § 313.

The term "contract" debt, as used in the Convention, almost certainly includes public loans. For an admirable discussion of this convention, see Moulin, *La Doctrine de Drago*, 305–346. See 3 *A. J.*, 772–776 for a review of this excellent work.

Les guerres civiles (1903), 448–478; * Triepel, *Völkerrecht u. Landesrecht*, 13, 324–381; Tchernoff, *Le droit de protection* (1898), especially liv. III, ch. 4; Ullmann (2d ed.), § 39; Vattel, liv. II. §§ 63–78; Wiesse, *Le droit int. appliqué aux guerres civiles*, § 14, pp. 43–55; 1 Westlake, ch. 14; Wheaton, § 32; 2 Wharton, *Digest*, ch. 9, §§ 223 ff.

PART II

THE OBJECTS OF INTERNATIONAL LAW

158. **Introductory.** — The objects of the Law of Nations are: (1) material goods or things; and (2) individuals or persons (including corporations).

The main *things* to which the rules of International Law apply are land territory, territorial waters, the open sea, aërial space, public vessels (mainly warships), private vessels (mainly merchantmen), and other public and private property of various sorts.

In the following chapters we shall first consider the various forms of a State's territory, and the modes of acquisition. This will be followed by chapters on aërial space and the open sea (including the non-territorial or property rights of States, more especially the jurisdiction over warships and merchant vessels in times of peace). Finally, we shall consider the rights and duties of individuals as objects of International Law during peace.

CHAPTER XI

A STATE'S TERRITORY AND ITS BOUNDARIES

159. **The Nature of Territorial Sovereignty.** — A State's territory is that definite portion of the earth's surface which is subject to its sovereignty or *imperium*. According to the old maxim, *Quidquid est in territorio, est etiam de territorio.*[1] This territorial supremacy should be distinguished from the non-territorial or property rights which a State enjoys over its public and private domain.[2] Nor should it be confused with the right of eminent domain by virtue of which a State may expropriate private property for public purposes, though it should be noted that this right of eminent domain[3] is essentially an exercise of territorial sovereignty, and may be exercised for international as well as national purposes.

The jurisdiction of a State extends, with certain exceptions to be noted hereafter,[4] over all persons and things found on its territory, and may also be employed for international as well as national purposes. Territorial sovereignty is of the nature of *imperium* rather than *dominium*,[5] *i.e.* it is an imperial rather than a property right. With certain exceptions,[6] this *imperium* or territorial supremacy is exclusive in character, and cannot be exercised by more than one sovereign State over a given territory.

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[1] Or in respect to persons, *qui in territorio meo est, etiam meus subditus est.*

[2] See *supra*, §§ 129–130.

[3] On the right of *Eminent Domain*, see especially: Beach, *Public Corporations in the United States* (1893), §§ 653–688; Cooley, *Constitutional Limitations* (7th ed.), 753; 15 *Cyclopedia of Law and Procedure*, 543–1029; * Elliot, *Municipal Corporations* (1910, 2nd ed.), ch. 10, §§ 83–98; *Encyclopedia of Law* (2nd ed.), 1043–1205; Lewis, *The Law of Eminent Domain* (3d ed., 1909); Mills, *The Law of Eminent Domain* (2d ed., 1888); Nichols, *The Power of Eminent Domain* (1909); Randolph, *The Law of Eminent Domain.*

[4] See *infra*, §§ 209, 211, 270 ff., 289–291.

[5] The saying of the great French jurist Portalis is frequently cited in this connection: "Property belongs to the citizen, empire to the sovereign."

Some publicists still speak of territorial sovereignty as a property right. This is doubtless a mediæval survival of the terminology introduced into public law by the feudal confusion of rights based upon the exercise of sovereignty and those derived from the ownership of land.

160. **Extent of a State's Territory.** — The territory of a State consists of land, water, and air. It may be thus classified: (1) The Land Domain. (2) The Maritime and Fluvial Domain or Territorial Waters, using the latter phrase in a general sense. (3) Aërial Space.

161. **The Land Domain.** — The Land Domain consists of all the land (including colonies and dependencies)[7] to which the State has a valid title. Especially important are such means of communication as the public highways, telegraph lines, etc., which are subject to public control.

The Land Domain of a State also includes all islands formed within its territorial waters,[8] and the territorial subsoil beneath its land and water surface. This jurisdiction over the subsoil, which extends to an indefinite depth, arises from the necessity — a need increasingly felt — of conserving for future generations the rich treasures found beneath the earth's surface. In certain cases, international regulation may be deemed desirable.[9]

162. **Boundaries or Frontiers of a State.** — The frontiers or boundaries of a State are usually classed as natural or physical, and artificial or conventional. To avoid international conflicts and controversies, it is very important that they be accurately drawn and definitely ascertained.

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[6] See 1 Oppenheim, § 171, for these exceptions.

[7] It does not, strictly speaking, include a Vassal State under Suzerainty or a Protectorate. But inasmuch as the Suzerain or Protector frequently exercises jurisdiction within the Vassal or Protected State, no general rule can be laid down in respect to such territory. It certainly does not include the Back Country (*Hinterland*), spheres of interest, and the like. It probably includes leased territory.

[8] In the case of the *Anna* (1805), 5 C. Rob. 373, Sir Wm. Scott held that a chain of uninhabited mud islands situated at a distance of a mile and a half from the western shore of the principal entrance of the Mississippi River formed natural appendages to the coast, and that the extent of territory or marine league should be measured from these islands. For the case of the *Anna* in abridged form, see 1 Moore, *Digest*, § 82, pp. 269–270, and Scott, *Cases*, 684–687. For comments, see Lawrence (3d ed.), § 91, p. 142; 1 Oppenheim, § 234, and 1 Westlake, 118.

[9] On the importance of the subsoil and the different systems of mine exploitation, see 1 Nys, 411–412.

163. **Natural Boundaries.** — Natural Boundaries[10] have been formed, for the most part, by mountains, forests, deserts, valleys, steppes or plateaus, marshes, the open sea, rivers, and other territorial waters. They rest upon prescription or immemorial custom, or are more definitely defined by conventions.

164. **Artificial Boundaries.** — Artificial boundaries are necessarily fixed by treaties and usually follow imaginary astronomical or mathematical lines based on latitude or longitude. They are often marked by various signs or landmarks, such as stones, posts, walls, trenches, roads, canals, buoys, etc.

165. **Rules for Fixing Natural Boundaries.** — In the absence of treaties, the following rules regulating natural boundaries are laid down by the customary Law of Nations: —

(1) In case of a navigable river, the boundary line follows the middle of the so-called *thalweg* (down way),[11] *i.e.* the strongest current of the midchannel or navigable portion of the stream.[12] If the river be not navigable, the line runs down the middle of the stream.[13]

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[10] Natural boundaries have played a very important rôle in the history of international relations (witness, *e.g.* the repeated attempts of the French to establish the Rhine, Rhone, and the Pyrenees as the natural boundaries of France); but, owing to ever increasing facilities for interstate communication by artificial means, the subject is one of ever decreasing importance. A consideration of the value of natural frontiers would be beyond the scope of a work on International Law, which merely prescribes the rules to be followed in the absence of boundary treaties or conventions. For references on *Boundaries,* see Bibliography at the end of this chapter.

[11] For the etymological meaning of this word, see 1 Westlake, 141 n.

[12] As the result of convention or prescription, it is sometimes the case that the whole bed of the stream belongs to one of the co-riparian States. This is the case with the Ohio River, no part of which was included in the cession of Virginia to the United States (in 1871) of "the territory northwest of the river Ohio." In *Handly's Lessee* v. *Anthony* (1820), 5 Wheaton, 374, and Scott, 116, it was held that the State of Kentucky extended to low-water mark on the western and northwestern side of the Ohio, and that an island or peninsula (whether island or peninsula depending on the height of the river) formed by the Ohio and a channel or bayou on the north side of the river belongs to the State of Indiana. See also *Indiana* v. *Kentucky* (1889), 136 U. S. 479.

In *Buttenuth* v. *St. Louis Bridge Co.* (1888), 123 Illinois, 535, and *Iowa* v. *Illinois* (1893), 147 U. S. 1, the phrase "middle of the Mississippi River" was construed as meaning the "middle of the main channel" or "thread of the stream."

Two of the cases cited above may be found in Scott, 116–129. See Scott, 78 and 131, for citations of other leading cases. For a long citation from *Iowa* v. *Illinois*, see 1 Moore, *Digest*, 128, pp. 618–619.

[13] This is the earlier rule, but it has the disadvantage of being a shifting line. Yet

(2) "Where a boundary follows mountains or hills, the water divide constitutes the frontier."[14] This is readily determined where there is a range or ridge of mountains with a sharply defined crest. But where the mountain barriers consist of "a tumbled mass of peaks and gorges,"[15] the problem becomes very difficult.[16]

(3) When States are separated by lakes or landlocked seas, the boundary line follows the middle of such seas or lakes. But these are sometimes divided between the bordering States by convention.[17]

(4) "In a narrow strait separating the lands of two different States, the boundary line runs either through the middle or through the midchannel, unless special treaties make different arrangements."[18]

Though it is held in the United States that questions of boundary between independent nations are political in their nature,[19]

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the modern rule of the *thalweg* is not without similar inconveniences. It also is subject to change, though to a lesser degree. "The law, as stated by law writers and in the adjudged cases, seems to be well settled that where a river is declared to be the boundary between States, although it may change imperceptibly from natural causes, the river as it runs continues to be the boundary. But if the river should suddenly change its course or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed." This is the identical language of Justices Scott and Smith in *Buttenuth* v. *St. Louis Bridge Co.* (1888), 123 Illinois 533, and *Cooley* v. *Golden* (1893), 52 Missouri Appeals 52. See Scott, pp. 123 and 131.

See also *St. Louis* v. *Rutz* (1891), 138 U. S. 226; *Nebraska* v. *Iowa* (1892), 143 U. S. 359, 368; and the opinion of Cushing (1856), 8 Opp. Atty. Gen., 175–176. For a summary of *Nebraska* v. *Iowa* and citation of cases, see 1 Moore, *Digest*, § 82, pp. 271–273. For other cases, see 1 Moore, § 128.

[14] Hall (5th ed.), p. 122. Cited by Moore (I, § 127), who adds: "This rule, while simple enough in principle, is often exceedingly difficult of application." For examples, see his references to Moore's *Int. Arbitrations* on p. 616 of the *Digest*.

On some interesting questions arising out of boundary disputes in South America, see also the *Chronique*, in 8 *R. D. I. P.* (1901), 486 ff.; Alvarez, in 10 *Ibid.* (1903), 651–690; and Moulin, in 11 *Ibid.* (1904), 150 ff.

[15] Curzon, *Frontiers* (1907), p. 19. In this very remarkable Romanes lecture, Lord Curzon calls attention to the "well-known geographical fact that in the greatest mountain systems of the world, for instance, the Himalayas and the Andes, the water divide is not identical with the highest crest."

[16] It is, of course, possible that a mountain range may belong wholly to one or the other of the coterminous States.

[17] For examples, see 1 Oppenheim, § 179. The use of the water is, however, common to the bordering States.

[18] 1 Oppenheim, § 199, p. 255. He cites 1 Twiss, §§ 183–189.

[19] See especially *Foster and Elam* 75; Neilson (1829), 2 Peters 253 and Scott 75; *U. S.* v. *Texas* (1891), 143 U. S. 621 and Scott 76; and the cases therein cited.

boundary disputes are eminently proper subjects for judicial determination, and should always be referred to courts of arbitration or mixed commissions for settlement.

166. **International Servitudes.** — International servitudes are perpetual restrictions not involving a loss of sovereignty on the territorial or personal sovereignty[20] of one State in favor of another State or of other States. They are based either upon express convention or upon a tacit agreement resulting from immemorial usage, and are usually divided into two classes — positive and negative servitudes.

167. **Positive Servitudes.** — Positive servitudes are those which grant to a State the right to perform certain acts on the territory of another State, such as fishery rights in territorial waters, the construction and operation of a railway, the collection of customs dues, the passage of an army or the garrisoning of a fortress, and the exercise of certain judicial, military,

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But the United States courts do not hesitate to assume jurisdiction over boundary disputes between States or between a Territory and a State of the Union. There is no sound reason why an International Court should not be established for the decision of boundary and other disputes of a judicial nature between members of the family of nations.

[20] Though International or State Servitudes are usually restrictions on territorial sovereignty, *i.e.* servitudes *in rem*, the author knows of no good reason why the use of the term should be confined to this class of limitations on sovereignty, as many publicists would have it. There may be servitudes *in personam* as well as servitudes *in rem*, as far as the Law of Nations is concerned; and the latter class of servitudes may be restrictions upon personal as well as territorial sovereignty. Undoubtedly the term is often misapplied, *e.g.* by Hall (p. 159 of 5th ed.) when he includes "the right of innocent use of territorial seas" in his list of servitudes. This is a general restriction on territorial sovereignty imposed upon all States by International Law. The characteristic mark of an International Servitude is that it is a perpetual limitation on sovereignty in the interest of some particular State or States. But such restrictions are not sufficiently important to involve any actual loss of sovereignty, as they do, *e.g.* in the case of a Protectorate.

The prevalent conception and theory of International Servitudes as territorial in character is denied by the following publicists: Bulmerincq, in 1 Marquardsen, § 49; Gareis, § 71; Liszt (3d ed.), pp. 71 and 159; Jellinek, *Allgemeine Staatslehre* (2d ed.), 391–393; and 2 Nys, 271–279.

It may be asked in what respects a State Servitude differs from an ordinary international obligation. The answer would appear to be that it creates a more permanent and irrevocable class of obligations. They are not extinguished by cession or conquest and continue to be obligatory upon the annexing State. There is a difference of opinion as to whether the clause *rebus sic stantibus*, supposed to be implied in every treaty, is at all applicable to servitudes, which may be considered a species of vested rights in favor of another State or other States. It would certainly seem that they cannot be revoked except in the most extreme cases.

and police functions on foreign territory. Examples of positive servitudes are: the Russian and Japanese railways in Manchuria, the collection of customs dues by the United States in San Domingo, the exercise of consular rights of jurisdiction in the Orient, and the former French fishery rights on the coasts of Newfoundland.

168. **Negative Servitudes.** — Negative servitudes are those which obligate a State to abstain from exercising its territorial or personal sovereignty in certain ways, such as a convention not to exercise certain judicial, military, or police functions on its own territory; an agreement not to fortify certain places; an obligation not to permit certain classes of foreigners to reside on national territory or to abstain from acts of jurisdiction over nationals of another State; and the conditions sometimes imposed by treaties of peace requiring a limitation of naval or land armaments, etc. Examples of negative servitudes are: the agreement of Russia and Japan (see Art. 9 of Treaty of Portsmouth in 1905) "not to construct in their respective possessions on the island of Sakhalin or the adjacent islands any fortifications or other similar military works;" the promise of France to England made several times in the eighteenth century not to fortify Dunkirk (these clauses were abrogated in 1783); and the obligation imposed by the Powers upon Russia at the Congress of Paris in 1856 to demolish all fortresses upon the Black Sea and not to maintain a fleet of warships in these waters, — an intolerable servitude which Russia did not hesitate to declare no longer binding upon the outbreak of the Franco-German War in 1870.

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71 and 159; * F. de Martens, §§ 93–95; G. F. de Martens, § 111; 2 Mérignhac, 366–368; 2 Moore, *Digest*, § 177; Neumann, § 13; * 2 Nys, 271–179, and *Ibid.*, in 37 *R. D. I.* (1905), 118 ff.; * 1 Oppenheim, §§ 203–208; 1 Phillimore, §§ 280–283; 1 Piédelièvre, Nos. 448–452; * 2 P.-Fodéré, Nos. 834–845, 1038; * 1 Rivier, 73, 258, 296–303; Taylor, § 252; 1 Twiss, § 245; * Ullmann (2nd ed.), 99; 1 Westlake, 61; Wilson and Tucker, §§ 55, 68; Wilson, § 52.

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CHAPTER XII

MODES OF THE ACQUISITION AND LOSS OF TERRITORY

169. There are five modes by which a State may acquire a legal title to territory.

Accretion. — (I) By *Accretion*, which is, comparatively speaking, of slight importance. It consists in the increase or enlargement of the land territory of a State mainly[1] through the action of its rivers or the ocean. These formations are usually caused by gradual alluvial deposits at the mouths of rivers (deltas) and on the seacoast, but they may result from sudden acts of violence, as where a stream suddenly detaches a portion of the soil on one bank of the river and deposits it on the opposite bank. New islands formed in rivers, lakes, or within the maritime belt belong to the neighboring State or States. In the latter case, the marine league is measured from the shores of such islands.[2]

170. **Prescription.** — (II) By *Prescription*, which has been well defined as "the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order." [3]

It has been denied[4] that *usucapion* or acquisitive prescription can furnish a good title to territory, but the majority of publicists admit that long-continuous and uninterrupted possession purges a title which may originally have been tainted with fraud or violence. This latter view, which is in accord with international practice,[5] is based upon the need of international order and stability. There is, however, no definite time limit in International Law which acts as a bar to claims against the possessor.

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[1] Such formations may also be artificial, as in the case of embankments, dikes, etc., built along a river or on the seacoast. Holland has wrested considerable portions of her territory from the ocean.

The rules governing accretion are derived from the Roman Law. See Justinian, 2 *Institutes*, I, 20–24; 42 *Digest*, I, 7, 29, 65; and Grotius, II, c. 8, §§ 8–16.

[2] See *supra*, § 161, n. 8, for the decision of Lord Stowell in the case of *The Anna* (1805), 5 Rob. 373, and Scott, 684. For the rules relating to river boundaries, see *supra*, § 165.

[3] 1 Oppenheim, § 242, p. 294.

[4] By Heffter, § 12; Klüber, §§ 6 and 125; 2 Mérignhac, 415–418; Pomeroy, §§ 107–114; G. F. de Martens, §§ 70–71; 1 F. de Martens, § 90; and Ullmann (2nd

171. **Conquest or Subjugation.** — (III) By *Conquest* or *Subjugation.*[6] A completed conquest is the incorporation of foreign territory, *i.e.* its complete and permanent subjection to the territorial jurisdiction of the conquering or occupying State, after its subjugation by armed forces. This incorporation must be shown by some act showing intention (such as a decree of annexation) and ability to maintain permanent possession.

Several leading authorities[7] refuse to recognize conquest as a

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ed.), § 92, p. 308. Some of the authorities follow Grotius (II, c. 4) who rejects the *usucapion* or acquisitive prescription of the Roman law, but accepts a title based upon immemorial possession; the others wholly reject international prescription.

[5] Considerable portions of the territory of modern Europe (*e.g.* Poland) may be said to be held by a title originally based on prescription and conquest, and later recognized by treaties, etc.

The treaty of Washington (1897) for the settlement of the boundary dispute between Great Britain and Venezuela laid down the following rule (among others) for the conduct of the arbitrators: "Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription." 1 Moore, *Digest*, § 88, p. 297.

For other instances of international practice, see Ralston, in 4 *A. J.* (1910), 133–144. On *Prescription*, see especially (in addition to the references at the end of this chapter) Audinet, in 3 *R. D. I. P.* (1898), 313 ff.

[6] Oppenheim (I, § 236 and II, § 264) distinguishes between conquest and subjugation. This is correct from his point of view, for he uses the term "conquest" in the sense of effective military occupation. While this undoubtedly corresponds with the usual or popular use of the term, it does not represent the technical meaning of the words as employed by most of the authorities on the Law of Nations. The substitution of "subjugation" for "conquest" as a source of title to territory would scarcely remove all danger of misunderstanding, for it would also be necessary to distinguish between its popular and technical meaning.

On *Military or Belligerent Occupation*, which should be clearly distinguished from conquest, see *infra*, ch. 26.

[7] Bonfils, No. 535; Despagnet, No. 863; 2 and 3 Fiore, Nos. 863 and 1693. Cited by 1 Oppenheim, 289 n. Audinet (3 *R. D. I. P.*, 1896, 320) appears to think

legal mode of acquiring territory, but this view is in contradiction with the facts of historical development and international practice. Whatever may be said as to the desirability of abolishing the so-called right of conquest, and however desirable that the validity of titles based upon fraud and violence be denied,[8] we cannot substitute our wishes for realities or create rules of International Law by ignoring the practice of nations.[9]

Titles based upon conquest should be clearly distinguished from those derived from prescription on the one hand, and cession on the other. Most titles popularly supposed to be based upon conquest are, technically speaking, based upon cession.[10]

172. **Distinction between Conquest, Cession, and Prescription.** — "Title by conquest differs from title by cession in that the transfer of the territory is not effected by treaty, and from

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that titles usually cited as based upon conquest are really based upon prescription; but this view, while applicable in some cases, is clearly untenable in other instances.

[8] The writer is among those who ardently desire that some future Hague Conference may abolish this so-called right of conquest, or at least declare titles based upon future conquests invalid. He is of the opinion that this would be an important step in the direction of international peace.

Respecting this so-called right of conquest, it would seem that modern International Law neither denies nor affirms, but it unquestionably recognizes the validity of titles based upon conquest.

[9] "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted." Chief Justice Marshall, in *Johnson* v. *McIntosh* (1823), 8 Wheat. 543, 588, and Scott, 71.

[10] Thus, our title to the Philippine Islands is technically based upon cession. It would be based upon conquest if they had been formally annexed without express cession by Spain, and if we had continued to hold and govern them after the substantial cessation of hostilities. It would be based upon prescription if we had simply continued to hold and govern them for an indefinite length of time without notification or an act of formal annexation. Of course, these suppositions ignore constitutional obstacles.

Recent instances of conquest have been those of Hanover, etc., by Prussia in 1866, and the Orange Free State and South African Republic by Great Britain in 1900–1901.

Napoleon the Great's conquests were generally recognized, having, indeed, usually been secured by cessions. There were, however, several cases in which the legality of his acts was disputed. The most famous of these was the *Case of the Elector of Hesse Cassel.* For the main facts bearing on this case, see Hall (5th ed.), 567–569; 2 Halleck (3d ed.), 496–499; 3 Phillimore, §§ 568–574; Snow, *Cases*, 381–383.

title by prescription in that there is a definite act or series of acts out of which the title arises. These acts are successful military operations; but if a province conquered in a war is afterwards made over to the victorious power by treaty, it is acquired by cession. Title by conquest arises only when no formal international document transfers the territory to its new possessor. Title by prescription arises only when no fact but long-continued possession can be alleged as a foundation for the existence of sovereign rights." [11]

173. **Effects of Conquest.** — The main effects of conquest, like those of cession, on the native inhabitants of the conquered or ceded territory have been considered in the chapter on "The Succession of States." The most important general principle governing this subject is that the conquering or annexing sovereign does not, by the mere fact of cession or conquest, acquire any special rights over the lives and private property of his new subjects. They fall, of course, under his personal and territorial jurisdiction; but in the absence of express legislation, their private and property rights remain unaffected.

174. **Cession.** — (IV) By *Cession*, which consists in the formal transfer by convention of territory from one State to another. The treaty of cession usually contains stipulations respecting the rights and duties of allegiance or nationality, the proportionate share of the public debt to be assumed by the annexing or ceding State, etc.; but no general rules can be laid down governing these matters.

From the standpoint of International Ethics, cessions might be classified as voluntary or forcible, *i.e.* as due to the voluntary action of the ceding State during a time of peace or as resulting from armed coercion at the close of a war. But such a division would be valueless from the point of view of International Law, inasmuch as there is a legal fiction that all cessions are voluntary, whether brought about by conquest or by more peaceable means.

175. **Classification of Cessions.**—From a legal standpoint, cessions may be said to be with or without consideration.

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[11] Lawrence, *Principles* (3d ed.), § 98. *Cf. Ibid.* (4th ed.), § 77.

(1) They may be sold or exchanged. *Sales* of territory are less frequent than formerly, but they are familiar to the student of American History who will readily recall the purchase of Louisiana, Florida, and Alaska. *Exchange* is also less frequent than formerly, though there are several instances in recent European History. By the Treaty of Berlin in 1878, Roumania ceded to Russia a portion of Bessarabia in exchange for the Dobroutcha, and the island of Heligoland in the North Sea was ceded by England to Germany in exchange for territory in East Africa in 1890.

(2) The great majority of modern cessions are in the form of *gifts*. Free or voluntary gifts of territory are, indeed, rare, and cessions of territory without consideration are usually found in treaties of peace, *i.e.* they are really forced gifts. Recent instances are the cession of the southern portion of the island of Sakhalin by Russia to Japan in 1905, and the cession of Porto Rica[12] by Spain to the United States in 1898.

176. **The Plebiscite.** — Several publicists[13] maintain that an affirmative popular vote is desirable or necessary on the part of the inhabitants of the ceded district in order to give validity to a cession of their territory. The theory of the *plebiscite* was first systematically applied to territorial cessions during the French Revolution, and was especially advocated by Napoleon III, by whom it was applied to the annexation of Nice and Savoy by France in 1860, and to the cession of Venice to Italy in 1866.[14] The custom, while not objectionable in itself, is liable to certain abuses in practice, and can be said to have only a

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[12] Cessions by marriage settlement and testament have practically ceased since the disappearance of the patrimonial conception of the State. That the latter form of cession is not wholly obsolete under an absolutistic régime is shown by the will of Leopold II, King of the Belgians, bequeathing the Congo Free State to Belgium. For the text of this "curious will," see 1 Oppenheim, § 216, p. 271 n.

[13] Among the few advocates of the *plebiscite* in the case of cession are: Funck-Brentano et Sorel (1887), 157 f. and 335 ff.; Rouard de Card, *Études*, 37–74; and Rotteck, Art. "Abtretung" in *Staatswoerterbuch* (begun in 1834 and cited by 1 Rivier, 210). This theory finds very little favor amongst authorities on International Law.

[14] The *plebiscite* was also applied on a large scale by Sardinia (1860 to 1870) in the creation of the modern kingdom of Italy, and by France to the island of St. Barthelemy, which was ceded to France by Sweden in 1877. It should especially be noted that the plebiscite has never found favor in the eyes of either Great Britain or the United States.

very limited sanction, either in theory or in practice. In any case, it is certain that the legal validity of a title based on cession does not require such action on the part of the inhabitants of the ceded territory.

177. **The Option.** — It has, on the other hand, been customary, at least during the second half of the nineteenth century, to insert in treaties of cession a clause granting to the inhabitants of the ceded territory the *option* of retaining their old allegiance or citizenship by means of an express declaration to this effect. But it appears to be the law that, in the absence of an express stipulation to the contrary, the annexing State may, for the sake of safety, expel those of the inhabitants who choose to retain their old allegiance. Many treaties stipulate for the option to emigrate within a certain period. Some permit option without requiring emigration.[15]

178. **Disguised Cessions.** — There are several forms of cessions which have been aptly described as disguised or indirect cessions.

(1) The various leases of territory for a term of years (usually 99 years) which have been quite frequent, particularly in China, within recent years. Examples are the lease of the ports of Kiao-chau to Germany, of Port Arthur and Talien-wan (Dalny) to Russia, and Wei-hai-wei to Great Britain in 1898.

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[15] The Treaty of 1898 between the United States and Spain appears to have granted the right of option to the Spanish-born residents of the Philippine Islands, but refused it to the native Filipinos. See Randolph, *The Law and Policy of Annexation* (1901), 60. For treaty stipulations on the subject, see Cogordan (*La nationalité*, etc., 2nd ed., 1890, 328 ff.). On the cession of Alsace-Lorraine, see *Ibid.*, 358 ff. For the law and practice of the United States, see 3 Moore, *Digest*, §§ 379–380.

"The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided." Chief Justice Fuller, in *Boyd* v. *Thayer*, 143 U. S. 135. See 1 Moore, p. 311, for citation of additional cases.

On the *Plebiscite and Option*, see especially: Bry, No. 175; * Bonfils (Fauchille), Nos. 427–431, 567–571; Cabouat, *Les annexions*, etc. (1881), 192–218; * Cogordan, *La nationalité*, etc. (1890), 317–398; * Despagnet, Nos. 334–339, 400; * Funck-Brentano et Sorel (2d ed., 1887), 157 f., 335 ff., 503 f.; Hall (5th ed.), 46–67; Liszt (3d. ed.), § 10, pp. 92–95; 1 F. de Martens, § 90; * 3 Moore, *Digest*, §§ 379–380; * 2 Nys, 16–26; * 1 Oppenheim, § 219; Randolph, *The Law and Policy of Annexation* (1901), 59 ff.; 1 and 2 Rivier, 204–212, 438–439; * Selossé, *Traite de l'annexion* (1880), 281–351; Ullmann (2d ed.), 98; 1 Westlake, 70–74.

(2) Administrative occupation, *i.e.* the indefinite occupation of certain districts, islands, or provinces, as those of Cyprus and of Egypt by England in 1878 and 1882, and of Bosnia and Herzegovina by Austria in 1878. The latter provinces were formally annexed in 1909, but Cyprus and Egypt are still "occupied" by Great Britain, though subject to the nominal sovereignty of Turkey.[16]

179. **Occupation.** — (V) By *Occupation* which has been defined as "the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State." [17]

180. **Conditions of Occupation.** — Under the modern law of occupation which is derived from the Roman law of *occupatio*, at least two conditions are essential for complete title to territory thus acquired.

(1) The occupied territory must be *res* or *territorium nullius*, *i.e.* at the time of occupation it must be either uninhabited or, if peopled by uncivilized tribes which are not politically organized under any government possessing the marks of sovereignty,[18] it must have remained unappropriated by any civilized State.

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[16] On *Disguised Cessions*, see especially Gérard, *Des cessions déguisés* (1904); De Pouvourville, in 6 *R. D. I. P.* (1899), 113 ff.; Perrinjaquet, in 16 *R. D. I. P.* (1909), 316 ff.; and 1 Westlake, 133–139.

[17] Oppenheim, § 220, p. 275. Oppenheim thus distinguishes occupation from conquest and cession: "Occupation as a mode of acquisition differs from subjugation chiefly in so far as the conquered and afterwards annexed territory has hitherto belonged to another State. Again, occupation differs from cession in so far as through cession the acquiring State receives sovereignty over the respective territory from the former owner State."

[18] Such territory may once have been occupied and abandoned, but, as a rule, it has never been occupied.

At the West African Conference of Berlin held in 1885, Mr. Kasson, the plenipotentiary of the United States, declared that his Government "would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression." But the Conference "hesitated to express an opinion" upon such "delicate questions."

It is generally admitted, at least by Anglo-American authorities, that so-called treaties of cession by uncivilized chiefs or tribes have, strictly speaking, no legal validity. These lack the necessary "capacity" to make valid contracts or treaties. In International Law, the possession of a government having the marks of sovereignty is the test of civilization. See especially, Westlake, *Chapters*, 137–155; and Chief Justice Marshall, in *Johnson* v. *McIntosh* (1823), 8 Wheat. 543 and Scott, *Cases*, 71. *Cf. infra*, § 90.

(2) Occupation must be real or effective. This includes: (*a*) The *animus domini* or expression of intention as shown by a formal act of annexation[19] or of notification to the other Powers. It must be a State act, *i.e.* made by properly authorized agents of the government, or subsequently ratified in case of settlement by unauthorized colonists. (*b*) Actual settlement or real and effective occupation. This involves at least the establishment of a responsible administration capable of maintaining a degree of order sufficient for the protection of existing rights.[20]

181. **Discovery as a Title.** — It will thus be seen that mere discovery,[21] or even annexation, does not confer a valid title to

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[19] "The formalities accompanying annexation are not prescribed by International Law. In modern times it is usual to hoist the national flag and read a proclamation setting forth the intention of the government to take the territory in question as its own; but any ceremony of clear import done on the spot in a public manner is sufficient." Lawrence, *Principles* (3d ed.), § 93, p. 147. *Cf. Ibid.* (4th ed.), § 74, p. 152.

[20] Art. 35 of the General Act of the Berlin Conference (1884–1885) declares: —

"The signatory Powers of the present Act recognize the obligation to assure, in the territories occupied by them, upon the coasts of the African Continent, the existence of an authority sufficient to cause acquired rights to be respected, and as the case may be, the liberty of commerce and of transit in the conditions agreed upon." For an English translation of the text of the General Act, see Supplement to 4 *A. J.* (1910), 7 ff. For Arts. 34 and 35, see p. 24.

Art. 34 declares: "Any Power which shall henceforth take possession of territory upon the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall require them, as also any Power which shall assume a protectorate there, shall accompany the respective act with a notification addressed to the other signatory Powers of the present Act, in order to enable them, if need be to make good any claims of their own."

It can hardly be successfully maintained that *notification* is at present essential to the validity of a title to territory acquired by occupation, at least outside of Africa.

The Institute of International Law adopted a Project of ten articles Relative to the Occupation of Territory in 1888. It makes notification a condition of effective occupation. For the text of this Project, see *Tableau*, 145, or 10 *Annuaire*, 201. For the discussions of the Project and the reports of MM. de Martitz and Engelhardt, see 9 and 10 *Annuaire*, 244 ff., 176 ff., and 201 ff.

[21] Vast claims to territory were formerly based on mere discovery, especially if accompanied or followed by an assertion of possession. Thus England granted a wide stretch of territory in America extending "from sea to sea" to the Plymouth Company in 1620, and Spain and Portugal claimed vast territory based on discovery and Papal grants.

The history of occupation has been divided into three periods: (1) Up to the sixteenth century, acquisitions of new territory were mainly based upon Papal grants. (2) In the sixteenth and seventeenth centuries the English, French, and Dutch, having refused to recognize the validity of the Papal grants to Spain and Portugal, based their claims on a priority of discovery or possession, or both. (3) During the territory acquired by occupation. At the most it constitutes an inchoate title which in practice operates as a bar to occupation by another State within a reasonable time. For a State failing to respect the clearly expressed intention of another State to appropriate a newly discovered or recently annexed *territorium nullius* would be guilty of an unfriendly act.

182. **Extent of the Area of Occupation.** — So far we are on solid gound, for the authorities appear to be unanimous. But there is a wide difference of opinion when it comes to the difficult question of determining the area within which an effective occupation operates.

The older Anglo-American view is thus expressed by Twiss: "When a nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the independence and security of its settlement."[22] This view is, generally speaking, repudiated, especially by recent Continental authorities, who demand actual or effective occupation of the whole area claimed. "No State can appropriate more territory through an act of occupation than it can regularly govern in time of peace with its effective means on the spot."[23]

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eighteenth century, the publicists declared in favor of effective possession — a doctrine which was put into practice in the partition of Africa in the latter half of the nineteenth century.

On the history of occupation, see especially Jèze, *Étude sur l'occupation* (1896), 1–40; and Salomon, *L'occupation des territoires sans maître* (1889), 31–101. For a brief account, see * Bonfils (Fauchille), Nos. 537–451; and Despagnet, No. 403.

The recent discoveries in the Arctic and Antarctic Polar regions afford no basis for the assertion of title by Great Britain or the United States. See Scott and Balch, in 3 and 4 *A. J.* (1909 and 1910), 928 ff. and 267 ff. See also Waultrin, in 15 *R. D. I. P.* (1908), 78 ff., 185 ff., and 16 *R. D. I. P.*, 649 ff., 401 ff.

[22] 1 Twiss (2d ed., 1884), *Peace*, § 124. *Cf. Ibid.*, *The Oregon Territory*, 174. Cited by Westlake (*Chapters*, 172), who adds: "But the principle of security can hardly be relied on as governing the distribution of territory except for very small areas contiguous to real settlements."

The principle of security is thus stated by Hall (p. 104 of 5th ed.), as to which he erroneously claims that "there is no difference of opinion": "A settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them."

This view is apparently shared by most of the Anglo-American publicists with the exception of Walker and Westlake. See *e.g.* Lawrence (3d ed.), § 94; 1 Phillimore, § 137; Pomeroy, §§ 98 ff.; and Taylor, § 99.

[23] Holtzendorff, in 2 *Handbuch*, 263. Cited with approval by Westlake (*Chapters*, 166).

In view of the conditions laid down with such apparent unanimity as essential to effective occupation, it is difficult to avoid the conclusions of the more recent writers on this subject. The area of effective occupation can extend no farther than real possession or the actual exercise of sovereign rights over the region claimed. So much is necessary in order to confer a complete or legally valid title. But, as in the case of territory claimed on the basis of mere discovery or annexation, the occupier has a presumptive or inchoate title to such portions of the contiguous [24] or neighboring country (if it be *territorium nullius*) as may be deemed necessary for defense or future settlement within a reasonable time, or which form a part of the geographical unity of the region actually settled. Such presumptive or inchoate title operates as a bar to settlement or colonization by another State.

183. **Islands.** — It is almost unanimously [25] admitted that the occupation of a portion of an island of moderate size amounts to occupation of the whole; and that, in the case of a group of small islands, the actual occupation of one furnishes at least a presumptive title to all the rest. It is generally agreed that islands lying or forming within the marine league belong to the territory on the coast.

"The limits of occupation are determined by the material possibility of making the authority of the government respected within the extent of the territory occupied. There is no occupation where the power of the State is not felt." 1 F. de Martens, § 89, p. 464. See also to the same effect, Jèze, 285 ff.; Liszt (3d ed.), § 10, p. 95; 2 Mérignhac, 458; 1 Rivier, 196; and Salomon, 319 ff.; Art. 35 of the General Act of the Conference of Berlin, cited above; and Art. 1 of the "Project Relative to the Occupation of Territory" adopted by the Institute of International Law in 1888.

But Bonfils (No. 553) justly remarks: "It is reasonable that one should recognize in the occupying State a certain right of preference in respect to the future and definite acquisition of a free zone contiguous to its actual possessions." As to the extent of this zone, Bonfils favors the "reasonable principle, acceptable in theory, but more than difficult to apply in practice" — that the zone should include all the country "forming a geographical unity with the point occupied."

[24] The doctrine of *contiguity*, as set forth by Secretary Calhoun (see 1 Moore, *Digest*, § 81, pp. 264–265), is generally denied. For references, see Jèze, *Étude sur l'occupation*, 288. It can only be said to confer an inchoate or presumptive title, and then only for comparatively small or moderate areas.

This theory of contiguity has been revived in our day in connection with the partition of Africa under the German name of *Hinterland* (Back Country), *Sphere of Influence*, etc. See *infra*, §§ 186–187.

[25] Salomon (*L'occupation*, etc., 323) dissents from this view, but it is generally admitted both in theory and practice.

184. **Large Islands and Continents.** — There is considerable authority in theory and practice for the view that in case of occupation of a certain seacoast, "possession is understood as extending into the interior country to the sources of the rivers emptying within that coast to all their branches and the country they cover."[26] This theory of the watershed should only be applied to rivers of moderate length, such as those emptying into the Atlantic Ocean on the eastern coast of the United States. It could have no reasonable application to such rivers as the Mississippi or the Columbia.

In cases where there is intermediate vacant land contiguous to the settlements of two nations, "each nation has an equal title to extend its settlement over the intermediate vacant land, and thus it happens that the middle distance satisfies the juridical title, whilst it is the nearest approximation to a natural boundary, and the most convenient to determine."[27]

The above statements may be regarded as fairly descriptive of the correct theory and practice, provided it be understood that the "title" or "possession" thus claimed are merely inchoate or presumptive. In no case can a fort or settlement at the mouth of a river give title to the whole basin, as claimed by the United States in the Oregon controversy.[28] And the

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[26] Messrs. C. Pinckney and Monroe, U. S. ministers, to Mr. Cerallos, Spanish Minister, respecting the boundaries of the Louisiana territory (April 20, 1805), in 2 *Am. State Papers* (*For. Rel.*), 664. Cited by 1 Moore, *Digest*, § 81, p. 263.

This is the first principle laid down by the United States. The second lays down the principle of the middle distance. "A third rule is, that, whenever any European nation has thus acquired a right to any portion of territory on that [the American] continent, that right can never be diminished or affected by any other Power, by virtue of purchases made, by grants or conquests, of the natives within the limits thereof."

These rules are expressly cited and adopted by 1 Phillimore, § 238, and 1 Twiss, § 125. The principle of the watershed is criticised by 1 Westlake, 113 f.

[27] Twiss, *Peace*, § 132, p. 216. The boundary line between the United States and Mexico (case of Texas) was finally drawn in accordance with this principle. See Hall (5th ed.), 106–108. "But there can be no doubt that natural boundaries would be preferred to an imaginary line in cases where these exist." Lawrence, (3d ed.), § 94, p. 152.

[28] Mr. Gallatin to Mr. Addington, Dec. 19, 1826, in 6 *Am. St. Papers* (*For. Rel.*), 667. Cited by 1 Moore, *Digest*, § 81, p. 263.

The claim of the United States to the so-called Oregon Territory (between the Rocky Mountains and the Pacific Ocean, and between the 42d degree and 54th degree and 40 minutes of north latitude) was based upon the following grounds: (1) Prior discovery and exploration, and the establishment of the first posts and occupation of one bank of a river does not confer a title to territory upon the opposite bank.

There are several forms of disguised or qualified occupation which remain to be considered.

185. **Disguised or Qualified Occupation. The Colonial Protectorate.** — The most important of these is the Colonial Protectorate[29] which may, indeed, amount to a virtual annexation. It has been defined as "a region in which there is no State of International Law to be protected, but which the Power that has assumed it does not yet claim to be internationally its territory, although that Power claims to exclude all other States from any action within it."[30] Yet "the powers exercised in a [colonial] protectorate are in fact territorial."[31] Jurisdiction is claimed and asserted over foreigners as well as over nationals of the protecting State, which incurs a certain measure of *de facto*

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settlements. (2) The virtual recognition of the title of the United States by the British Government as shown by the restitution of Astoria in accordance with the Treaty of Ghent in 1814. (3) The acquisition by the Treaty of 1819 of the titles of Spain derived from discovery. (4) The ground of contiguity.

The exclusive claim of the United States was opposed by Great Britain on the following grounds: (1) Prior discovery and contemporary exploration and establishment of posts. (2) The express reservation of the British claims upon the restoration of Astoria in 1818. (3) A denial of the Spanish claims. (4) A denial of the doctrine of contiguity.

The controversy ended, as such controversies usually result, in a compromise. The Treaty of Washington (1846) established the 49th degree of north latitude as the permanent boundary between the United States and the British possessions.

On the *Oregon Controversy*, see especially: Foster, *A Century of American Diplomacy*, 302–313; Hall (5th ed.), 108–111; * Moore, 1 and 5 *Digest*, §§ 80–81, 104, 835; **Ibid.*, 1 *Int. Arbitrations*, chs. 7 and 8; Pomeroy, § 103; * Twiss, *The Oregon Question* (1846); * Wheaton, §§ 172–176.

In the equally famous boundary dispute between Great Britain and Venezuela, the claims of Venezuela were based mainly upon Spanish discoveries and settlements; those of Great Britain on prescription, conquest, and occupation, due to subsequent Dutch and British settlements. Through the intervention of the United States in 1895, the questions at issue were finally arbitrated in 1899. Great Britain secured through this award the greater part of the territory in dispute between Venezuela and British Guiana, but Venezuela retained the entire mouth of the Orinoco River.

On the *Venezuelan Boundary Dispute*, see Moore, 1 and 5 *Digest*, §§ 88, 966, pp. 533–583. For a brief summary, see Hall (Atlay's 5th ed.), 111–113.

[29] See *supra*, § 106, for comparison with International Protectorates. It is sometimes difficult to draw the line of demarkation.

[30] 1 Westlake, 123–124.

[31] Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown*, § 98, p. 224.

international responsibility for the maintenance of order and the conduct of the natives over whom it exercises a certain amount of authority or control. The powers exercised within such a region usually have the sanction of treaties with the native chiefs or tribes, although the source of the legal validity of such authority and control as is exercised must be sought for in the laws, decrees, or charters of the protecting State rather than in these treaties with the natives.

The main advantages of a colonial protectorate for the protecting State are that it affords a means of excluding other Powers and preparing the way for annexation without incurring the burden of complete sovereignty and international responsibility involved in real and effective occupation; for the natives, it affords a means of gradual initiation into the mysteries of so-called civilized life. It appears also to be less objectionable to neighboring Powers than complete occupation.

Article 34 of the General Act of the Berlin Conference lays down the same condition of notification for protectorates as for occupation on the African coast; but it is only to *occupations* that Article 35 attaches the obligation of insuring the establishment of authority[32] "sufficient to protect acquired rights," etc. The authorities hold, however, that the exercise of a certain amount of authority (at least sufficient for the maintenance of a degree of order) is obligatory in a colonial protectorate as in a territory under real occupation. The difference is merely one of degree. The latter assumes the exercise of complete, the former of partial, sovereignty.

186. **The Hinterland.** — The American theory of contiguity has been revived in recent times in connection with the partition of Africa in the form of claims to the *Hinterland* (Back Country). Extensive regions in China and Africa extending far beyond any

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[32] The original proposal to extend this obligation to protectorates met with the opposition of England and Germany. But Arts. 1 and 2 of the "Project relative to Occupations of Territory" adopted by the Institute of Int. Law in 1888 insists upon "the establishment of a local responsible power, provided with means sufficient to maintain order and to assure the regular exercise to its authority within the limits of the territory occupied" in the case of protectorates as well as of ordinary occupations. *Tableau*, 145–146. This also appears to be the opinion of most of the authorities. Westlake (I, 124), for example, says: "There can be no doubt that the principle of that obligation applies equally to colonial protectorates."

territory which could properly be denominated *Hinterland* have been divided up between the Powers into what are called[33] *Spheres of Influence or Interest.*

187. **Spheres of Influence or Interest.** — Such divisions are based upon conventions, which appear to be mainly of two kinds:

(1) Agreements for reciprocal abstention from territorial acquisition. An example is the Agreement of 1886 between England and Germany: "Germany [or Great Britain] engages not to make acquisitions of territory, accept protectorates, or interfere with extension of British [or German] influence, and to give up any acquisitions of territory or protectorates already established in that part of the Western Pacific lying to the east, southeast, or south [or west, northwest, or north] of the said conventional line."[34]

(2) Agreements not to alienate territory. An example is the Agreement of 1898 between Great Britain and China that the latter "will never alienate any territory in the provinces adjoining the Yangtsze to any other Power, whether under lease, mortgage, or any other designation."[35] Such agreements can have no legal validity except for the contracting parties. At the most they confer a feeble inchoate title which acts as a bar to trespass by third Powers.

188. **Loss of Territory.** — As there are five modes of acquiring title to territory, so there are five corresponding modes of losing it, viz. physical loss, prescription, conquest, cession, and dereliction. There is also a sixth, viz. a successful revolt or rebellion, to which there is no corresponding mode of acquisition.

189. **Physical Loss of Territory.** — There are only two modes of loss of territory which require any special discussion.[36]

As territory may be increased through accretion, it may be diminished through physical means, such as earthquakes, volcanic action, the washing of the waves, the gradual subsidence of the earth's surface, etc. In case of the disappearance of an island near the coast through volcanic action, the marine league would thereafter be measured from the mainland instead of from the site of the former island.[37]

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[33] There seems to be no clear distinction between these terms. Both are vague. *Spheres of Influence* appear to have more of a *political*, *Spheres of Interest* rather an *economic*, significance.

[34] Cited by 1 Westlake, 128.

[35] *Ibid.*, 132.

[36] The case of successful revolt has been considered under the head of "Recognition of Independence," *supra*, § 122.

190. **Dereliction.** — Dereliction corresponds to occupation. It is "effected through the owner's complete abandonment of the territory with the intention of withdrawing from it forever, thus relinquishing sovereignty over it. Just as occupation requires, first, the actual taking into possession (*corpus*) of territory and, secondly, the intention (*animus*) to acquire sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention to give up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability to retake possession of the territory. Thus, for instance, if the rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able and makes efforts to retake possession. It is only when a territory is really derelict that any State may acquire it through occupation."[38]

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[37] For the rules governing changes in river boundaries, see *supra*, § 165.

[38] 1 Oppenheim, § 247. For the cases of Santa Lucia and Delagoa Bay, see Hall, 116–118. On the disputed claims of Brazil and England to the island of Trinidad, see 1 Moore, *Digest*, § 89.

"The United States maintained that Navassa Island in 1857, when a citizen of the United States took possession of it under the Guano Islands Act, was 'derelict and abandoned.'" 1 Moore, *Digest*, p. 299. See *Jones* v. *U. S.* (1890), 137 U. S. 202, and Scott, *Cases*, 38.

XII, ch. 6; 1 Pédelièvre, Nos. 419–443; Pomeroy, §§ 91–123; 2 P.-Fodéré, Nos. 781–833; 1 and 2 Rivier, 172–217 and 436–442; * Salomon, *L'occupation des territoire sans maître* (1889); Scaife, in 4 *Papers of the Am. Historical Assoc.* (1890), No. 3, pp. 269–293; * Scott, *Cases*, 38–44, 71–74, 95–97, 655–674; Snow, *Cases*, 6–12, 364–373, 393–396; Selossé, *Traité de l'annexion* (1880), 61–98, 281 ff.; Taylor, §§ 217–227; * 1 Twiss, ch. 8, §§ 113–139; *Ibid.*, *The Oregon Question* (1846); Ullmann (2d ed.), §§ 92–98; * Vattel, liv. I, §§ 81, 203–210, and liv. II, §§ 79–98, 140–151; Walker, *Manual*, §§ 9–13; 1 Wharton, *Digest*, §§ 2–3; Wheaton, §§ 161–176; * Westlake, 84–140; *Ibid.*, *Chapters*, 134–177; Wilson, § 28.

For additional references, especially on *Occupation*, see Bonfils (Fauchille), (5th ed.), p. 319; Chrétien, Nos. 142–146; Bulmerincq, in 1 Marquardsen, § 50; Gareis, § 70; Grotius, lib. II, c. 9; Hall (5th ed.), 116–118; Heffter, § 72; Holtzendorff, in 2 *Handbuch*, 274–79; Klüber, § 140; 2 Mérignhac, 449–450; * 1 Moore, § 89; * 1 Oppenheim, §§ 244–47; * 1 Phillimore, §§ 284–95; 2 P.-Fodéré, Nos. 850–66; 1 Rivier, 217–220; Ullmann (2nd ed.), § 100.

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CHAPTER XIII

TERRITORIAL WATERS

191. (I) **The Marginal Sea.** — The territory of a State bordering on the open sea also includes the Territorial or Marginal Sea, which is usually held to be a marine league measured from the low-water mark.[1]

192. **History of the Marine League.** — The three-mile limit, or marine league, was originally based upon the principle first clearly enunciated by Bynkershoek[2] in the early part of the eighteenth century that the territorial sovereignty or jurisdiction of the State is limited by its power to defend its seacoast by force of arms — *potestatem terræ finiri ubi finitur armorum vis*, i.e. *quousque tormenta exploduntur.* The range of the cannon of that day seems to have been about a marine league or three nautical miles, and this distance became the generally recognized limit of the marginal sea in the course of the eighteenth century. During the nineteenth century the rule of the marine league appears to have completely supplanted the principle upon which it

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[1] That the jurisdiction of a State over its littoral or marginal sea is based upon territorial sovereignty is denied by some good authorities on what appear to be insufficient grounds. For a criticism of their views, see especially Heilborn, *System*, 37–57; 1 Oppenheim, § 185; Schücking, *Das Küstenmeer*, 14–20; and 1 Westlake, 191–192.

For the argument against the doctrine of territorial sovereignty as applied to territorial waters, see De Lapradelle, in 5 *R. D. I. P.* (1898), 264 ff. For the views of leading authorities on this point, see De Lapradelle, *op. cit.*, 271–272.

Jurisdiction over territorial waters may, of course, include property rights, but it is not essentially based upon property, as many of the older authorities supposed.

The low-water mark is usually taken as the starting point for the measurement of the marine league, but there is a considerable variety of opinion on this point. See, *e.g.* Imbart de Latour, *La mer territoriale*, 20 ff.; 1 Nys, 502–505; and 1 Oppenheim, § 186. The low-water mark has the sanction of many treaties, the British Territorial Waters Jurisdiction Act of 1876, and of the Institute of International Law. See 13 *Annuaire*, 329.

[2] *De dominio maris* (1702), ch. 2. *Cf.* the vaguer statements of Grotius (lib. II, cap. 3, §§ 13 and 14), and Vattel (liv. I, ch. 23, § 289).

was originally based; and, instead of being extended to meet the demands of new modern guns of ever increasing range, it has always remained the same until it is now apparently as fixed and unalterable as were the laws of the Medes and the Persians. And this in spite of the protests of publicists and the efforts of statesmen.[3]

There can be no doubt that an extension of the three-mile limit for all territorial purposes would be highly desirable. The marine league no longer satisfies the needs of modern requirements for defense. An extension to meet these requirements is certainly favored by an ever increasing number of publicists, and has been strongly recommended by the Institute of International Law.[4]

193. **Right of Innocent Passage.** — Though the marginal sea is undoubtedly territorial, "all ships without distinction have the right of innocent passage through the territorial sea, saving to belligerents the right of regulating such passage and of forbidding it to any ship for the purpose of defense, and saving to

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[3] The great majority of modern publicists favor an extension of the three-mile limit, but some of them do not distinguish clearly between the present three-mile rule and the principle upon which it was originally based. For references, see the Bibliography at the end of this chapter.

In 1806 the Government of the United States attempted to obtain a recognition of a six-mile limit from England, but refused to admit a claim of six miles made by Spain to the Cuban coast in 1863 and 1864. Secretary Seward, in 1 Moore, § 146. In 1864 Secretary Seward proposed a zone of five miles to the British Legation at Washington. 1 Moore, § 152. The British Government has, however, always insisted upon the three-mile limit. Norway claims four miles. See Aubert, in 1 *R. D. I. P.* (1894), 429 ff.

The three-mile limit has the sanction of a considerable number of State Acts and Treaties, *e.g.* the Russian Prize Rules of 1869, the British Territorial Waters Acts of 1876, French legislation in 1866 and 1888, the North Sea Fisheries Convention of 1882, the Convention of Constantinople relating to the Suez Canal of 1888, and the Convention of 1893 concerning the Behring Sea. For additional treaties, ee 1 Calvo, § 356; and 1 Nys, 509.

[4] In 1894, the Institute of International Law, after an exhaustive discussion of this question, voted by a decisive majority (there was no division of opinion as to the desirability of extending the three-mile limit) in favor of a zone of six marine miles for all territorial purposes. It even permitted the extension of this zone for purposes of neutrality beyond six miles in time of war, provided the range of cannon shot were not exceeded. See 13 *Annuaire*, 329, or *Tableau décennal* (1894–1904), 340 ff.

The maritime Powers were urged to hold an International Congress for the adoption of these or similar rules, but no such Congress has even been held. It is highly desirable that this recommendation by the Institute be acted upon.

neutrals the right of regulating the passage of ships of war of all nationalities through the said sea."[5] But such vessels, if merchantmen, are probably liable in principle to the jurisdiction of the riparian State.[6]

194. **Exercise of Authority beyond the Marine League.** — There is considerable authority and practice in favor of the view that for purposes of defense and in order to execute its revenue

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[5] Art. 5 of the Rules adopted by Institute of International Law. See 13 *Annuaire*, 329. Translated by 1 Westlake, 189.

This is unquestionably a rule of International Law based on the universal practice of nations. It, of course, does not include cabotage or the right to engage in the coasting trade.

Art. 7 declares that "ships which pass through territorial waters must conform to the special regulations published by the littoral State in the interest and for the safety of the navigation or as a matter of maritime police." As Westlake (I, p. 190) points out: "The right of the littoral State to publish regulations in the interest of navigation does not include a right to exact payment of dues, by ships not entering its harbors, under pretext of providing the navigation with necessary lights and buoys." See also 1 Oppenheim, § 188.

There is a difference of opinion as to whether *warships* enjoy the right of innocent passage through the territorial waters. They certainly have the customary right of passage through such portions of the marginal sea as constitute international highways. See 1 Oppenheim, §§ 188 and 449. Hall (p. 159 of 5th ed.) denies that the right of innocent passage extends to warships. For a refutation of this view, see Westlake (I, 192), who points out that the "ship of war as well as the merchantman may have a lawful errand beyond the littoral sea in question," which "in the course of its lawful voyage it may be difficult for it to avoid."

Oppenheim (I, § 449) is of the opinion that "a State is in strict law always competent to exclude men-of-war from all or certain of its ports and from those territorial waters which do not serve as highways for international traffic."

This is undoubtedly the law in respect to ports and international highways. But Oppenheim (I, § 188) elsewhere admits that "as a rule, however, no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt," and that "a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace."

[6] The authorities are divided on this point. Art. 6 of the Rules adopted by the Institute (see *supra*) declares: "Crimes and offences committed on board foreign ships passing through the territorial sea by persons on board of them against persons or things on board the same ship, are as such outside the jurisdiction of the littoral State, unless they involve a violation of the rights or interests of the littoral State or of its subjects not forming part of the crew or passengers."

This is a good practical rule and it represents the prevailing custom, but it may be doubted whether it is a principle of International Law. As in the analagous case of jurisdiction over foreign merchantmen in port (see *infra*, § 211), it would seem that there is no good reason for denying local jurisdiction over passing vessels *in principle*. The British Territorial Waters Act of 1878 claims such jurisdiction. See especially Hall (5th ed.), 204–206; 1 Oppenheim, § 189; and 1 Westlake, 254 ff.

On the *Immunity of Warships from Local Jurisdiction*, see, *infra*, § 209.

and sanitary laws, a State may exercise a limited authority beyond the three-mile limit. Such limited authority or jurisdiction has been asserted and exercised, at least by Great Britain,[7] the United States,[8] and France;[9] and, whether on the basis of comity[10] or of law, appears to encounter no opposition on the part of other States. But such exercise of limited authority to enforce revenue or quarantine regulations does not justify the seizure[11] of foreign vessels outside the territorial waters, except possibly in cases of extreme necessity on grounds of self-defense, or when a hot pursuit begun in marginal waters is continued on the open sea.[12]

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[7] The British Hovering Acts (9 Geo. II, c. 35 and 24 Geo. III, c. 47) of 1736 and 1784 asserted a jurisdiction, for revenue purposes and for the prevention of "hovering" on the coast in a menacing and annoying manner, to a distance of four leagues from the shore. They have long since been repealed. Atlay (note 179 a to Wheaton) tells us that "the present customs legislation [of Great Britain] makes a distinction as regards the extent of jurisdiction claimed for revenue purposes between ships belonging to British subjects and ships belonging to foreigners." While asserting a jurisdiction extending *three leagues* from the shore in case of British subjects, it only claims *one league* if the owners are not British. See Customs Act of 1876, 39 and 40 Vict., c. 36. "British Acts of Parliament require vessels liable to quarantine or having infectious diseases on board to observe certain regulations when within two leagues of the coast of the United Kingdom, but they authorize no enforcement of those regulations except by the recovery of a penalty from the captain when the vessel arrives within the territory." 1 Westlake, 152.

For a very full discussion and defense of the British Hovering and Quarantine or Public Health Acts, see 2 Piggott, *Nationality*, 40–60.

[8] The revenue laws of the United States, embodied in the Act of 1799 (§ 27) and incorporated into the Revised Statutes (sec. 2760), direct the officers of the revenue cutters to "go on board all vessels which arrive within the United States or within four leagues thereof, if bound for the United States, and search and examine the same, and every part thereof, and [they] shall demand, receive, and certify the manifests required to be on board certain vessels, . . . and [they] shall remain on board such vessels until they arrive at the port or place of their destination." 1 Moore, § 151, pp. 725–726.

It should be especially noted that the law does not authorize the *seizure* of a foreign vessel beyond the three-mile limit, as has sometimes been asserted. It merely prescribes visit and search. "The Statute (of 1797) may well be construed to mean only that a foreign vessel, coming to an American port, and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to and shall come within the territory of the United States, after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction." Dana's note 108 to Wheaton, § 179, p. 258. See also 1 Moore, § 151, p. 726.

[9] It appears that France authorizes visit and search for the enforcement of revenue laws to a distance of two myriameters or about four leagues. 2 Mérignhac, 387; 1 Nys, 514; and 2 P.-Fodéré, No. 173.

The French Government insisted that the battle between the *Alabama* and *Kearsarge* should not take place within the range of cannon shot from the coast. 1 Moore, § 150.

[10] Twiss (I, § 190) remarks on this head: "Such laws and regulations, however, have no foundation of *strict right* against other nations. . . . It is only under the *Comity of Nations* in matters of trade and health that a State can venture to enforce any portion of her Civil Law against foreign vessels, which have not as yet come

within the limits of her maritime jurisdiction." He calls it a "permissive" jurisdiction and cites the case of *The Appollon* (1824), 9 Wheaton, 362.

The main point of this decision is thus stated in the syllabus at the head of the case: "It seems that the right of visitation and search, for enforcing the revenue laws of a nation, may be exercised beyond territorial jurisdiction, upon the high seas, and on vessels belonging to such nation, or bound to its ports."

Oppenheim (I, § 190) disagrees with the view of Twiss and Phillimore. He says: "I believe that, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the Law of Nations may be said to exist which allows riparian States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound to their ports, as are approaching, although not yet within, their territorial maritime belt."

[11] In *Rose* v. *Himely* (1808), 4 Cranch, 241, Chief Justice Marshall and a majority of our Supreme Court held that "a seizure beyond the limits of the territorial jurisdiction for breach of municipal regulations, is not warranted by the Law of Nations." *Cf.* to the same effect *The Louis* (1817), 2 Dodson, 210 and Scott, 352.

It has been claimed (Taylor, § 248) that *Rose* v. *Himely* was overruled by *Hudson* v. *Guestier* (1810), 6 Cranch, 281. This was the opinion of Chief Justice Marshall himself, but the report of the latter case leaves this point doubtful. See Dana's note 108 to Wheaton, § 179, pp. 259–260, and 1 Moore, *Digest*, § 151, p. 729.

Rose v. *Himely* is certainly in conflict with certain views previously expressed by Chief Justice Marshall in *Church* v. *Hubbart* (1804), 2 Cranch, 187; Scott, 343; and 1 Moore, 727–728. But the real purport of this decision was that "the court did not undertake to pronounce judicially, in a suit on a private contract (a policy of insurance) that a seizure of an American vessel made at four leagues, by a foreign power, was void." Dana, note 108 to Wheaton, p. 259, and 1 Moore, p. 729.

A novel question was raised in Alaska in 1904. Driven from the region of Cape Nome, the gamblers of that section established a gambling house on the ice beyond the three-mile limit. Did the United States Government have jurisdiction? For various answers, see Rolland, in *Chronique*, 11 *R. D. I. P.* (1904), 340–345; 31 *J. I. P.*, 503; and 2 Mérignhac, 384.

[12] Art. 8 of the rules adopted in 1894 by the Institute of International Law declares: "The littoral State has the right to continue on the high seas a pursuit commenced in the territorial sea, and to arrest and judge the ship which has broken its laws within its waters. In case, however, of capture on the high sea, the fact shall be notified without delay to the State of which the ship carries the flag. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power. The right to pursue is at an end as soon as the ship has entered a part of its own country or of a third Power." 13 *Annuaire*, 330. Translated by 1 Westlake, 189. This resolution was voted unanimously.

This doctrine has the sanction of Bluntschli, Art. 342 Hall (5th ed.), 256; Snow,

195. (II) **Bays and Gulfs.** — The territorial waters naturally include ports, harbors, roadsteads, and river mouths. They also include such bays and gulfs as are almost wholly inclosed by the territory of a single State and whose entrance from the ocean is narrow enough to be commanded by forts or shore batteries erected on one or both sides of the entrance, even if the entrance be wider than six miles or two marine leagues.[13] The entrance is formed by a line drawn from headland to headland. Some States claim jurisdiction over certain bays whose entrance is too wide to be effectively commanded by coast defenses,[14] and such claims would seem to have the sanction of the Law of Nations, provided they are based upon immemorial custom.[15]

sect. 26; 1 Rivier, 151; 1 Westlake, 173–174; and Woolsey, 58. See especially 2 Piggott, *Nationality*, 35–40. It is denied by Asser (see 1 Westlake, 174); Dana, note 108 to Wheaton, p. 260; Field, Art. 626; 1 Phillimore, 198; and Twiss, § 190.

In 1891 the *Itata*, a transport in the service of Chilean insurgents, was accused of violating the neutrality laws of the United States. She was pursued by American naval forces from San Diego, California to Iquique, Chile, where she was surrendered to Admiral McCann under duress, but without resistance. The United States and Chilean Claims Commission decided that "the United States committed an act for which they are liable to damages and for which they should be held to answer." 3 Moore, *Int. Arbitrations*, 3070. For the facts of the case, see also *U. S.* v. *Trumbull* (1891), 48 Fed. Rep. 99 and Scott, 731; 2 Moore's *Digest*, § 316; and Snow, *Int. Law*, 132–134. It should be noted that the *Itata* was pursued into Chilean territorial waters.

[13] The statement of this rule is that of Oppenheim (I, § 191) slightly modified. See also *Ibid.*, in 1 *Zeitschrift* (1906), 579–587.

Some publicists claim that gulfs or bays with an entrance wider than ten miles cannot be claimed as wholly territorial. But the Institute of International Law (see 13 *Annuaire*, 329) voted in favor twelve miles, unless a long-continued usage had established a more extensive jurisdiction.

[14] The United States claims the whole of the Delaware and Chesapeake Bays as territorial. See 1 Moore, *Digest*, 153, pp. 735–739, for opinion of Att.-Gen. Randolph (1793) in the case of the *Grange;* and 4 and 5 Moore, Int. Arbitrations, 4333, 4675, and Scott, 143 for the *Alleganean* (1885).

Great Britain holds Conception Bay in Newfoundland (which has an average width of fifteen miles, an entrance of twenty miles, and a depth of about forty miles) to be territorial. See 1 Moore, § 53, p. 740, and Snow, *Cases*, 45–47 for *The United States Cable Co.* v. *The Anglo-American Telegraph Co.* Great Britain also asserts jurisdiction over foreign as well as native fishermen in the Moray Firth. *Mortensen* v. *Peters*, 14 Scots Law Times Rep., Pts. 13 and 14. See also 1 *A. J.* (1907), 526, and 1 *Zeitschrift*, 583 and 588 ff.

It appears that Russia also claims jurisdiction over the White Sea. See "*L'affair de l'Onward Ho*," in 18 *R. D. I. P.* (1911), 94–99. For recent Canadian claims to the Hudson Bay, see Balch, in 6 *A. J.*, (1912), 409, ff.

[15] "For bays, the territorial sea follows the sinuosities of the coast, except that

With the exception of the marginal sea or marine league, gulfs and bays, whose entrance is too wide to be commanded by forts and shore batteries, usually belong to the open sea. This is also the case with such gulfs and bays as are surrounded by the land territory of more than one riparian State. In general, it may be said that the right of innocent passage and use applies to gulfs and bays as well as to the marginal sea, as far as private vessels or merchantmen are concerned, but that States need not admit foreign warships to these waters.

196. (III) **Straits.** — As a rule, the same principles apply to straits as to bays and gulfs. A strait dividing the land territory of a single State which is not too wide to be commanded by shore batteries [16] is territorial. But if such a narrow strait divides the

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it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea, where the distance between the two sides of the bay is twelve miles in width, at least unless a continuous and secular usage has sanctioned a greater width." Art. 3 of the rules of the Institute, cited above.

"In case of bays the three marine miles are to be measured from a straight line across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast." The Hague Tribunal in *United States* v. *Great Britain* (case of North Atlantic Coast Fisheries), in 4 *A. J.* (1910), 983.

There is considerable usage in favor of permitting exclusive fishery rights within a bay whose entrance does not exceed ten miles in width. Such stipulations are found in the Anglo-French Fishery Treaty of 1839, the Hague Convention of 1882 for the Regulation of Fisheries on the North Sea, and the project of the Anglo-American Treaty of 1888. See Imbart-Latour, *La mer territoriale,* 50–51; De Lapradelle, in 5 *R. D. I. P.* (1895), 265: and Perels, 43–44.

The claims of Great Britain to the "Narrow Seas" and the "Kings Chambers" have probably been abandoned. See 1 Oppenheim, §§ 191 and 195, with notes on pp. 247 and 250. In any case they are no longer valid.

The vague and shadowy claims to jurisdiction for domestic purposes over large portions of the Atlantic Ocean and Gulf of Mexico sometimes made by American publicists in behalf of the United States have been taken too seriously by Continental authorities. For the source of these misrepresentations, see 1 Kent, 30.

[16] Examples are the British Strait of Solent, which divides the Isle of Wight from England; the Dardanelles and the Bosphorus, which are Turkish waters; and the Russian Strait of Kertch, connecting the Sea of Azov with the Arctic Ocean.

By a treaty in 1846 and through subsequent acts, the United States and Great Britain claimed jurisdiction over the Strait of Juan de Fuca between Vancouver Island and the State of Washington, a channel which seems to have an average width of about fifteen miles. See 1 Moore, *Digest,* § 133; and Hall (5th ed.), 157. See also 1 Moore, *Int. Arbitrations,* ch. 7. This appears to be the only exception to the rule stated in the text.

In 1894 the Institute of Int. Law (see 13 *Annuaire,* p. 330, Art. 10) declared that the rules relating to the territorial sea (marginal sea and bays, *cf. supra,* p. 197 n.)

land of two different States, it belongs to the territory of both, the boundary line running through the mid-channel.[17] Foreign merchantmen have the right of innocent use and passage in territorial straits as well as in territorial bays, gulfs, and the marginal sea; but foreign warships do not have this right unless the strait forms an international highway.

If the strait forms an international highway, the right of innocent passage[18] for foreign warships and merchantmen exists even in the case of straits which are less than six miles in width.[19]

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apply also to straits whose width does not exceed twelve miles, with the following distinctions and modifications:

"1. Straits whose shores belong to different States form part of the territorial sea of the riparian States, which exercise their sovereignty to the middle line.

"2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the riparian State, always form part of the territorial sea of such State, whatever the distance between the coasts.

"3. Straits which serve as a passage from one free sea to another can never be closed."

Straits actually subject to conventions or special usages are reserved from the operation of these rules.

[17] Slightly adapted from Oppenheim (I, § 194), who cites the Lymoon Pass which separates the British island of Hong Kong from the Asiatic mainland as an historical example. It was "half British and half Chinese as long as the land opposite Hong Kong was Chinese territory."

[18] "In time of war, the territorial Power, if belligerent, may of course deal with the ships of the enemy as it pleases. The enemy will similarly exercise his belligerent right within the straits as elsewhere." Holland, *Studies*, 278.

[19] In 1879 the United States declared that it would not tolerate exclusive claims to the Straits of Magellan. Art. 5 of the Treaty of 1881 between Chile and the Argentine Republic provides: "Magellan's Straits are neutralized forever, and free navigation is guaranteed to the flags of all nations." 1 Moore, *Digest*, § 134, p. 664. See also Abribat, *Le dêtroit de Magellan* (1902). It should be noted that the term "neutralized" as applied in this connection is somewhat of a misnomer.

The Dardanelles and the Bosphorus, which form the entrance to the Black Sea, should be regarded as an exception to this rule. Their status is based on convention. According to a series of great international treaties, warships (with a few exceptions) are not allowed to pass through these Turkish Straits, but merchantmen are expressly permitted to do so. The present rule dates from the latter part of the eighteenth century. The Treaty of 1809 between Great Britain and Turkey expressly sanctioned the ancient rule of the Ottoman Empire forbidding all foreign warships from entering these waters. (As long as the Black Sea was wholly Turkish water, the Sultan had a right to prohibit merchantmen as well as war vessels from entering the Straits.) These stipulations were reaffirmed by the London Treaty of 1841, the Treaty of Paris of 1856, the London Conference of 1871, and the Berlin Treaty of 1878.

This rule was evaded or violated by Russia during the Russo-Japanese War when she sent several cruisers belonging to her Volunteer Fleet in the Black Sea through the Straits flying the commercial flag in the guise of merchantmen for the purpose of

For such innocent use no tolls may be collected, even on the ground of immemorial usage sanctioned by treaties;[20] although it is perhaps permissible to make necessary charges for the maintenance of buoys, lighthouses, pilots, etc.

197. (IV) **Inland Lakes and Landlocked Seas.** — It is universally agreed that lakes and landlocked seas which are wholly surrounded by the land territory of a single State are territorial. And most publicists[21] also agree that in the absence of special treaties,[22] such lakes and seas as are wholly inclosed by the territory of more than one State belong to the territories of the various riparian States in proportional parts, the boundary line running through the middle of these bodies of water. But the use of such territorial waters is common to all the bordering States.

198. (V) **International Lakes and Seas.** — International lakes and seas, *i.e.* such as are surrounded by several States and are at the same time connected with the open sea by a narrow navigable strait or channel, are also territorial; but they should be con-

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exercising the rights of search and capture in the Red Sea. Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 128 ff. and 148 ff.

The United States has acquiesced in the exclusion of her warships from the straits, but refuses to recognize the legal validity of the rule. 1 Moore, § 134, pp. 665 ff.

On the *Straits of Constantinople*, see especially Bonfils (Fauchille), Nos. 449–503; * Gorianow, *Le Bosphore et les Dardanelle* (1910); Holland, *The Eastern Question*, 225–227; * Mischef, *La mer noire et les détroits de Constantinople* (1899); 1 Nys, 459–470; 1 Oppenheim, §§ 181 and 197; Schuyler, *American Diplomacy*, 317–318; Wheaton, §§ 182, 191, with Dana's note 111.

[20] Through the persistence of the United States, the *Sound Dues* levied from time immemorial on vessels and cargoes passing through the Sound and the two Belts which form a passage between the North Sea and the Baltic, were abolished in 1857. They were redeemed by pecuniary indemnities. This topic, which is discussed at considerable length in most works on International Law, is now one of mere historical interest.

On the *Danish Sound Dues*, see especially: 1 Moore, § 134; Schuyler, *American Diplomacy*, 306–316; Snow, *American Diplomacy*, 124–127; and Wheaton, §§ 183–184, including Dana, note 112.

[21] So far as known to the author, the following publicists are alone in claiming that such lakes and seas as are wholly inclosed by the territory of several States are free: Calvo, 1, § 301; Caratheodory, in 2 Holtzendorff, 378; and Despagnet, No. 416.

[22] For examples of treaties which make a division of these seas and lakes between the riparian States, see 1 Oppenheim, § 179.

"The Caspian Sea is surrounded by Russia and Persia, but, by virtue of the treaties of Gulistan (1813) and Tourkmantschai (1828), it is subject practically to Russian control." 1 Moore, *Digest*, § 135.

sidered free and open to all the world,[23] at least as far as merchantmen and international trade are concerned.[24]

Thus, " so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might, with propriety, be considered a *mare clausum;* . . . but since the territorial acquisitions made by Russia, and the commercial establishments formed by her on the shores of the Euxine, both that Empire and the other maritime Powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus." [25]

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[23] Though the authorities are not agreed upon this point, such is the actual practice.

Among the authorities who claim that international lakes and seas are necessarily free to all the world are the following: 1 Calvo, § 301; Caratheodory, in 2 Holtzendorff, 378; Liszt (3d ed.), § 26, p. 206; 2 Mérignhac, 587; 1 Nys, 448 ff.; and 1 Rivier, 153 and 230.

Oppenheim (I, § 180) and Ullmann (§ 88, p. 29, 2d ed.) admit that this is the actual practice, but deny that it has been established as a rule of International Law.

[24] This does not, of course, apply to the coasting trade.

[25] Wheaton, § 182. *Cf.* Halleck (Baker's 3d ed.), p. 169. This principle is not admitted in respect to the Great Lakes of Ontario, Erie, Huron, and Superior (Lake Michigan is wholly within the territory of the U. S.) which are connected with the Gulf of the St. Lawrence by the St. Lawrence River. But the St. Lawrence River is not an international highway as much as are the Dardanelles and the Bosphorus. Besides, there are several important canals which render the connection between the Great Lakes and the Gulf of St. Lawrence partly artificial.

"At the time when the United States achieved independence the Great Lakes belonged exclusively to Great Britain. No other nation had any rights in or over them. By the treaty of peace of 1783 the lakes were divided between the contracting parties and the boundary fixed as running through the middle of the lakes and of the waterways connecting them. The United States and Great Britain thus shared thenceforth, to the exclusion of any claim whatsoever of a third nation, the territorial sovereignty over the lake waters, which had therefore been wholly British. . . ." Mr. Uhl, Acting Sec. of State, May 23, 1894. See to the same effect, Mr. Gresham, Sec. of State, Jan. 2, 1895, saying: "The Department concurs in the view expressed by the Canadian Judge (McDougall in the case of the American vessel *Grace*) that the lake waters on either side of the international boundary line are under the exclusive municipal jurisdiction of the respective countries." 1 Moore, *Digest*, § 137, pp. 673 and 675.

For the international boundary in the Great Lakes, see 1 Moore, *Int. Arbitrations*, chs. 5 and 6, and Vol. 6 for maps.

On the meaning of the term "high seas" as applied to the Great Lakes, see 1 Moore, *Digest*, § 136, pp. 670 and 673. See especially *United States* v. *Rodgers* (1893), 150 U. S. 249, and Scott, *Cases*, 132–142. See also Hunt, in 4 *A. J.* (1901), 285–313.

"In respect of the right of navigation, the lakes that separate the two countries, *i.e.* Lakes Ontario, Erie, Huron, and Superior, and their water communications, are

199. (VI) **National Rivers.**—It is generally [26] agreed that all streams lying wholly within the territory of a single State are national in character and are subject to the exclusive jurisdiction of the State within whose boundaries they flow. When navigable, such rivers are usually open to the merchantmen of all nations so far as *international* trade is concerned, but such freedom of navigation is a privilege rather than a right unless secured by treaty.

200. (VII) **International Rivers.**—Navigable rivers which flow through or between several States into the open sea are called International Rivers. They are undoubtedly territorial in the sense that such portions of these rivers as lie within the territory of a single State are subject to the jurisdiction of that State.[27]

Boundary rivers belong to the States whose territory they divide, the boundary line running, as a rule, either through the middle of the river or through the middle of the *thalweg* or navigable portion of the stream.[28] The use of boundary rivers is certainly common to all the co-riparian States. " Where a river forms the boundary between two countries, and the only access to the adjacent territories is through such river, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway." [29] It should also be open to the merchantmen of other nations for purposes of international trade.[30]

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treated as international waters, being dedicated in perpetuity to the common navigation of all the inhabitants." But this common right of navigation does not include the coasting trade. Lake Michigan is open to British subjects by treaty. 1 Moore, § 138, pp. 675–676.

The Baltic Sea is an open sea, in spite of the fact that the entrances to it from the North Sea are controlled by Denmark and Sweden. Various more or less successful attempts to close it to foreign warships during war have been made by the riparian States, but this pretention has never been admitted by the other Powers. See, *e.g.* Bonfils, No. 504, and Wheaton, § 185.

[26] A few publicists seem to be of the opinion that the principle of the freedom of navigation applies to navigable rivers generally. See, *e.g.* Despagnet, No. 428. Bluntschli (Art. 314) erroneously asserts that "streams and navigable rivers which are in communication with a free sea are open to the vessels of all nations in time of peace."

[27] The State does not ordinarily assert jurisdiction over the foreign vessel or its crew as long as their conduct does not affect the peace and comfort of the native inhabitants. It may not levy tolls for profit, but may collect charges for lights, buoys, dredging, and other incidental expenses.

[28] *Cf. infra*, § 165.

[29] 1 Moore, *Digest*, § 131, p. 627.

[30] In the case of *The Appollon* (9 Wheaton 362), it was held that "the mere tran-

In respect to rivers flowing successively through or between several States to the open sea, the majority of the more recent authorities[31] are of the opinion that the State or States located on the upper waters of such rivers, have at least an imperfect right to the innocent use of their navigable portions, and this view is in accordance with modern practice.[32] The right of innocent passage

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sit of a French vessel through the waters of a river which forms the boundary between the United States and the territory of a foreign State, for the purpose of proceeding to such territory, cannot be taken to subject the vessel to penalties imposed by the United States upon French vessels for entering their territory." 1 Moore, *op. cit.*

[31] Allowing for a few corrections, the authorities are thus tabulated by 1 Westlake, 158–159:

Those asserting the right of innocent passage: Bluntschli, § 314; Caratheodory, in 2 Holtzendorff, § 60; Despagnet, § 428; Engelhardt, in 2 *R. D. I.*, 372; 2 Fiore No. 774; Geffecken, in Heffter, § 77; Grotius, lib. II, cap. 2, § 13; Institute of Int. Law, *Annuaire* for 1887–1888, p. 182 (see also *Tableau*, 149); Pufendorf, lib. III, cap. 3, n. 5–8; 1 Rivier, 226; Ullmann, § 105; Vattel, liv. II, § 130; Wheaton, § 193. To this list should be added: 1 Halleck (Baker's 3d ed.), 173–174; Liszt (3d ed.), § 27, p. 216; 1 Mérignhac, 610 ff.; and 1 Westlake 153–159.

Those denying the right of innocent passage as a matter of strict law: 1 Calvo, §§ 219, 293; Heffter, § 57; Klüber, §§ 76, 135, 1 F. de Martens, § 101; G. de Martens, § 84; 1 Phillimore, § 160; 1 Twiss, § 145. To this list should be added: Creasy, No. 233; Lawrence, (3d ed.), § 112; 1 Oppenheim, § 178; Pomeroy, § 132; 2 P.-Fodéré, Nos. 728, 749; and Woolsey, § 62.

Bonfils (Fauchille), No. 524, simply says that "the general tendency of the modern doctrine is favorable to freedom of navigation, subordinated to measures of precaution and safeguard for the security of riparian States and in respect to their rights of jurisdiction, police, customs regulations," etc.

[32] The freedom of river navigation as a principle of public law is a modern doctrine. True it is that the "Roman law declared all navigable rivers to be so far public property that a free passage over them was open to everybody, and the use of their banks (*jus littoris*) for anchoring vessels, lading and unlading cargo, and acts of the like kind, to be incapable of restriction by any right of private domain." 1 Phillimore, § 155. But this was not a principle of International Law.

In the Middle Ages the idea of the public character of river navigation almost wholly disappeared. It was revived as a principle of the Law of Nations by Grotius (lib. II, c. 2, § 13), who proclaimed the doctrine of the freedom of navigation on rivers as well as on the open sea. The doctrine of the right of innocent passage on rivers was more fully elaborated by Vattel (liv. II, §§ 104, 117, 123, 128–129, 134). But it was practically disregarded in international practice until the outbreak of the French Revolution.

In November, 1792, the provisional Executive Council of France declared *apropos* of the Scheldt, which had been closed by the Treaty of Münster in 1648, that "river courses are the common and inalienable property of all the countries irrigated by their waters; that a nation cannot, without injustice, claim the exclusive right of occupying the channel of a river and prevent the neighboring peoples who inhabit its upper waters from enjoying the same advantage." Engelhardt (*Du régime conventionnel des fleuves internationaux*, 24), perhaps the leading authority on this sub-undoubtedly carries with it the incidental right to use the banks of such rivers for mooring, loading, and unloading cargoes, etc., provided such use is innocent and necessary.

ject, considers this proclamation "the first charter of contemporary fluvial liberties." A limited application of this principle was made by a number of treaties to which France was a party during the Revolutionary and Napoleonic period.

The Grotian principle was also adopted by the allied Powers in Art. V of the Treaty of Paris of 1814 which proclaimed the freedom of navigation upon the Scheldt, and upon the Rhine "from the point at which it becomes navigable *to the sea*." In 1815 the Powers represented at the Congress of Vienna declared that "those States which are separated or traversed by the same navigable river engage to regulate by common consent all matters relating to the navigation of this river." To this end they agreed to name a commission. Art. 108 of the Final Act of the Congress of Vienna. Art. 109 declared that "navigation on all rivers indicated in the preceding article, from the point where each of them becomes navigable to *its mouth*, shall be entirely free, and cannot, in respect to commerce, be prohibited to any one; it is understood, however, that one will conform to the regulations relative to the police of this navigation. These regulations shall be uniform for all and as favorable as possible to the commerce of all nations." See Engelhardt, in 11 *R. D. I.* (1879), 363 ff.; 1 Moore, *Digest*, p. 628; P.-Fodéré, Nos. 740–744; 1 Phillimore, 229–230 n.; Schuyler, *Am. Diplomacy*, 345 ff.; 1 Westlake, 147; and Wheaton, *History*, 498–506.

"In order to assure the application of this principle, articles were inserted expressly regulating in certain respects the free navigation of the Rhine; and it was provided that 'the same freedom of navigation' should be 'extended to the Necker, the Main, the Moselle, the Meuse, and the Scheldt, from the point where each of them becomes navigable to their mouths.' And in order to 'establish a perfect control' over the regulation of the navigation, and to 'constitute an authority which may serve as a means of communication between the States of the Rhine upon all subjects relating to navigation,' it was stipulated that a central commission should be appointed, consisting of delegates named by the various bordering States. . . . " 1 Moore, p. 628. These articles form part of Annexe XVI to the Final Act of the Congress of Vienna. Some of the provisions of the Vienna agreements appear to have been rendered illusory on certain European rivers.

The next important step was taken by the Congress of Paris in 1856. Articles 15–17 stipulated that the principles established by the Congress of Vienna should apply to the Danube, and provided for the creation of two commissions composed of delegates from each of the interested Powers — a temporary "European" Commission to clear the mouths of the river and the adjacent seas from obstructions, and a permanent "Danube River" Commission to prepare regulations for navigation and river police, etc. In 1883 a new "Mixed Commission of the Danube" was created for the purpose of supervising the execution of the regulations made for the navigation of the river. The most noteworthy features of this Commission are that a majority of votes are sufficient for a decision, and that the Commission appears to form a distinct International Person, having the power of prescribing and enforcing penalties for the violation of its regulations.

On the free navigation of the Danube, see especially * Bonfils (Fauchille), No. 528; * Engelhardt, in 16 *R. D. I.* (1884), 360 ff.; 2 Fiore, Nos. 790–794; Liszt, (3d ed), § 27, pp. 219–222; 2 Mérignhac, 619–625; * 1 Moore, *Digest*, 630 631;

201. (VIII) **Interoceanic Canals.** — The same rules applicable to international rivers and straits should be applied to international canals, which are artificial waterways forming an international passageway. The only permissible variation from these rules would seem to be that reasonable tolls may be collected to pay for the construction of the canal.

2 P.-Fodéré, Nos. 745–749; Schuyler, *Am. Diplomacy*, 352 ff.; * Ullmann (2d ed.), 105, pp. 335–338; 1 Westlake, 149–150.

In 1884–1885 the Congo Conference of Berlin agreed upon the free navigation of the Congo and the Niger, together with their tributaries, and created the International Congo Commission as a special international organ similar to the Mixed Commission of the Danube for the regulation of the navigation of the Congo which was also neutralized, the regulations respecting the Niger being left to the enforcement of the coriparian States. For references, see Bonfils, No. 530, p. 310 n. of 5th ed.

After Spain obtained control of both banks of the Mississippi River at its mouth, she claimed the exclusive right of navigation below the point reached by the southern boundary of the United States — a claim strongly resisted by the latter Power on treaty grounds and as forbidden by the Law of Nature and Nations. The dispute was terminated by the Treaty of 1795, which declared that the navigation of the Mississippi should be free to the United States as well as to subjects of the King of Spain. Through the subsequent acquisition of Louisiana and Florida by the United States, "the Mississippi ceased to be an international stream, and the right to control its navigation passed exclusively to the United States" (1 Moore, *Digest*, p. 265), although Great Britain put in a claim, which was based upon Article VIII of the Treaty of Peace (1782–1783), to the right of the free navigation of the river. This article declared that "the navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the United States." This right was granted, however, under the erroneous idea (as shown by Art. II of the same treaty) that the source of the Mississippi was in British or Canadian territory. The claim of Great Britain was afterwards abandoned. 1 Moore, p. 625.

There was also a controversy in 1823 and 1826 between Great Britain and the United States respecting the right of the free navigation of the St. Lawrence. As in the case of the dispute with Spain, the United States based its claim mainly on the "general principles of the law of nature" — an argument whose validity was denied by Great Britain. It may be noted that Westlake (I, 154) admits that "the American argument appears to have been well founded." The United States also urged that the St. Lawrence was analogous to a *strait* connecting navigable seas.

"By Article IV of the Reciprocity Treaty of June 5, 1854, it was agreed that the inhabitants of the United States should have 'the right to navigate the river St. Lawrence, and the canals in Canada, used as a means of communicating between the Great Lakes and the Atlantic Ocean,' as fully and freely as British subjects, subject only to the same tolls and assessments as the latter." The treaty of 1854 was terminated in 1866 in pursuance of a notice given by Congress.

"By Article XXVI of the Treaty of Washington of May 8, 1871, it was declared that the navigation of the river St. Lawrence, ascending and descending from the 45th parallel of north latitude, where it ceases to form the boundary between the

From the standpoint of the Law of Nations, purely internal canals are wholly national,[33] but international canals, or those forming a passageway for international traffic, while territorial and therefore under the control and jurisdiction of the State in which they lie, should be open to the warships as well as merchantmen of all nations for purposes of innocent use.

These principles should govern in the absence of treaties, but they have as a matter of fact been applied by convention in the cases of the two great interoceanic Canals of the Suez and the Panama.[34] Both of these Canals are declared "free and open" on terms of equality to warships and merchantmen of all nations.[35]

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two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation." On the other hand, it was reciprocally provided that the navigation of the rivers Yukon, Porcupine, and Stikine in Alaska should be free and open for purposes of commerce to the subjects of Great Britain as well as to citizens of the United States.

"By Article XXVII of the same treaty the British Government engaged to urge upon that of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with its inhabitants; and the United States engaged to grant to British subjects the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States," etc. See 1 Moore, *Digest*, § 131, pp. 634–635, for the citations and facts given above.

On the navigation of the Mississippi and the St. Lawrence, see especially: * 1 Am. State Papers, 253–259, and 6 *Ibid.*, No. 464, pp. 757–777; 1 Cobbett 116–120; Hall (6th ed.), 132–133; * 1 Moore, §§ 130–131; 1 Phillimore, §§ 160, 169–170; Pomeroy, §§ 133–134; * Schuyler, *Am. Diplomacy*, 264–291; Snow, *Cases*, 33–40; 1 Westlake 151–155; Wheaton, §§ 220–205, and Dana's note 118; Woolsey, § 62, pp. 81 and 82.

The Argentine Confederation declared the navigation of the rivers Parana and Uruguay open to merchantmen of all nations in 1852. In 1867, after a prolonged resistance, Brazil finally opened the Amazon and its tributaries to the merchant ships of all friendly States. The Orinoco does not appear to be wholly free.

On South American Rivers, see especially 1 Calvo, §§ 323–332; 2 Mérignhac 630–632; * 1 Moore 540–653; 2 P.-Fodéré, No. 753; * Schuyler, *Am. Diplomacy*, 319–344.

[33] An example of such a canal would be the Erie Canal in New York State.

[34] The Emperor William or Kiel Canal which connects the Baltic with the North Sea is open to the vessels of all nations, but it is regarded by Germany as purely territorial, having been built for strategic rather than commercial purposes. The Corinth Canal is of secondary importance. It connects the Gulf of Corinth with the Ægean Sea. Yet it is difficult to see why the principles governing international straits should not be applied to these Canals.

[35] *Cf.* Art. 1 of the Convention of Constantinople (1888) and Art. 3 § 1 of the Hay-Pauncefote Treaty of 1901. The latter significantly omits the phrase, "in

Neither are to be blockaded — a purely conventional stipulation which does not apply to natural straits — nor shall any act of war or hostility be committed within either.[36]

"Vessels of war of a belligerent shall not revictual nor take on stores in the Canal except so far as may be strictly necessary; and the transit of such vessels through the Canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service. Prizes shall be in all respects subject to the same rules as vessels of war of belligerents.

"No belligerent shall embark or disembark troops, munition of war, or warlike material in the Canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

time of war as in time of peace" contained in the former. It would seem from this that the United States reserves to itself the right to close the Panama Canal during a war, if necessary. Of course such a power will never be exercised except for purposes of self-protection. It is not likely that foreign warships, except those of an enemy, will ever be excluded from the innocent use of the Canal. Sect. 3 of Art. 1 contemplates the transit of the Canal by warships of a belligerent.

[36] This, of course, includes the marine league. The Treaty of Constantinople (Arts. 8 and 11) also forbids the "erection of permanent fortifications." "The United States, however, shall be at liberty to maintain such military police along the Canal as may be necessary to protect it against lawlessness and disorder." Art. 1, § 2, of the Hay-Pauncefote Treaty.

The first draft of the Hay-Pauncefote Treaty (which was rejected by the Senate), as also the treaty as amended by the Senate (which was rejected by Great Britain), contained a clause declaring that "no fortifications shall be erected commanding the Canal or the waters adjacent." This clause, which had also formed part of the Clayton-Bulwer Treaty of 1850 (now superseded), was omitted in the second Hay-Pauncefote Treaty at the suggestion of Great Britain, on the ground that it was not in harmony with the clause cited above, and might give rise to grave misunderstanding.

This omission appears to leave the question open, but there can be little doubt that the United States possesses the right to fortify the entrances to the Panama Canal. Surely this would be the case if it were a natural strait. Any limitation of this right must rest upon convention. That clause of the Clayton-Bulwer Treaty prohibiting fortification is certainly not in force. Art. 2 of the Hay-Pauncefote Treaty distinctly states that the Government of the United States "shall have and enjoy all the rights incident to such construction (of the Canal), as well as the exclusive right of providing for the regulation and management of the Canal." Art. 23 of the Treaty of 1903 with Panama expressly grants the right of fortification to the United States.

For an able argument against the fortification of the Panama Canal, see Hains, in 3 *A. J.* (1909), 354–394. For a reply, see General Davis, in *Ibid.*, 885–908. See also Knapp, in 4 *A. J.* (1910) 324–358. For the treaties and documents bearing on this interesting subject, see Supplement to 3 *A. J.*, 106 ff., especially 123–139.

"The provisions of this article shall apply to waters adjacent to the Canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

"The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the Canal, shall be deemed to be part thereof, for the purpose of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the Canal."[37]

It may be observed that these provisions are intended to secure the neutrality and open use of these great interoceanic canals. This neutrality is not effectively guaranteed; and they cannot be said to be fully *neutralized*,[38] inasmuch as the transit of friendly belligerent warships is permitted. The so-called neutralization of the Suez Canal is strengthened by an agreement of the leading Powers of Europe;[39] that of Panama by a treaty between the

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[37] Art. 3, §§ 3–6 of the Hay–Pauncefote Treaty. Except for a part of the last paragraph, these sections are substantially identical with Arts. 2–6 of the Treaty of Constantinople.

[38] To use a happy phrase of Lord Cromer's, they are *internationalized* rather than *neutralized*. Lord Cromer (2 *Modern Egypt*, 384) cites Lord Pauncefote as saying that the word "neutralization" as applied to the Suez Canal "had reference only to the neutrality which attaches by International Law to the territorial waters of a neutral State, in which a right of innocent passage for belligerent vessels exists, but no right to commit an act of hostility."

[39] Art. 10 of the Treaty of Constantinople recognizes the right of the Sultan of Turkey and the Khedive of Egypt to take such measures as they "might find it necessary to take for securing by their own forces the defense of Egypt, and the maintenance of public order." Such measures had indeed been taken by England in 1882 when she crushed the revolt under Arabi Pasha — an insurrection which resulted in her "temporary" occupation of Egypt. At a Paris Conference in 1885 the British delegates formulated a general reservation as to the application of the provisions proposed in so far as they "might fetter the liberty of their Government during the occupation of Egypt by the forces of Her Britannic Majesty." In 1887 this reservation was renewed by Lord Salisbury. In 1898 Lord Curzon declared in the British House of Lords that, owing to these reserves, the Convention of Constantinople had not been brought into practical operation." By Art. 6 of the Anglo-French Declaration of April 8, 1904, respecting Egypt and Morocco, Her Majesty's Government declared that they adhere to the stipulations of the Treaty of Oct. 29, 1888, and that they agree to their being put in force." Westlake, 328–329.

United States and Great Britain. But the main provisions of these conventions may also be said to constitute rules or principles of the Law of Nations which would operate even in the absence of such agreements.

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Marginal Sea or Marine League. — * Bluntschli, Arts. 302, 309–310; Bonfils (Fauchille), Nos. 491–494; Bry, Nos. 130–132; * Bynkershock,

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Westlake adds, however, "But whether with or without an express reservation, it must be considered that, in future as in 1882, rules having the freedom of the Suez Canal for their object cannot be interpreted as hindering the protection of that freedom by the Power best able to give it, in good faith and with no avoidable disturbance of commerce."

The control of the Suez Canal by Great Britain rests partly upon her occupation of Egypt and partly upon her ownership of nearly half of the shares in the Suez Canal Co.; that of the United States over the Panama Canal upon the construction and ownership of the Canal, and upon the "grant in perpetuity" by the Republic of Panama of "the use, occupation, and control of a zone of land, and land under water" of the width of ten miles in the Isthmus of Panama. Art. 2 of Treaty of 1903. See Supplement to 3 *A. J.* (1909), 130.

De dominio maris (1702), c. 2, and *Questiones juris publici*, I, c. 8; 1 Calvo, §§ 353–367; 1 Cobbett, *Cases* (3d ed.), 132–140; Creasy, Nos. 241–246; * Despagnet, Nos. 412–414; 2 Fiore, Nos. 801–807; * Fulton, *The Sov. of the Sea* (1911), sect. II, pp. 535 ff.; Godey, *La mer côtière*; Grotius, lib. II, c. 3, § 13; Hall (5th ed.), 151–154, 158–159; 1 Halleck (Baker's 3d ed.), 157–165; 1 Hautefeuille, 51–60; Heilborn, *System*, 37–57; Heffter, § 75; * Imbart-Latour, *Le mer territoriale* (1889), 20–38; 1 Kent, 29–31; Liszt (3d ed.), § 9, pp. 80 ff.; Lawrence (3d ed.), §§ 91, 107; *Ibid.*, (4th ed.), § 72; 1 F. de Martens, § 98; 2 Mérignhac, 370–392; * 1 Moore, *Digest*, §§ 144–152; 1 Nys, 497–522; * 1 Oppenheim, §§ 185–190; 1 Ortolan, 153–162; Perels, § 5; 1 Piédelièvre, Nos. 386–402; 1 Phillimore, §§ 197–198; Pomeroy, §§ 150–155; 2 P.-Fodéré, Nos. 617–639; * 1 Rivier, 145–153; * Stoerk, in 2 Holtzendorff 409–453; Taylor, §§ 247–250; 1 Twiss, §§ 190–192; Schücking, *Das Küstenmer* (1897); * *Queen* v. *Keyn*, in Scott's *Cases*, 154–170; Ullmann (2d ed.), § 87, pp. 290 ff.; * Vattel, liv. I, §§ 287–290; * Walker, *Manuel*, § 17, and *Science*, 171–175; 1 Westlake, 183 ff.; 1 Wharton, *Digest*, § 32; Wheaton, §§ 177–180, 189; Wilson, §§ 35–40; Woolsey, §§ 56–57.

Lakes, Seas, Gulfs, Bays, Straits, etc. — Bluntschli, Arts. 304–310; * Bonfils (Fauchille), Nos. 495–511, 516–519; * Bry, Nos 133–137, 139–141; 1 Calvo, §§ 301, 366–375; * Caratheodory, in 2 Holtzendorff, 378–385; 1 Cobbett, 140–153; Creasy, No. 240; Despagnet, Nos. 414–416, 424–427; 2 Fiore, Nos. 746–754, 802–815; Hall (6th ed.), 154–157; 1 Halleck (Baker's 3d ed.), 165–170; Heffter, §§ 76–77; * Imbart-Latour, 39–65; Lawrence (3d ed.), §§ 91, 107–109; *Ibid.*, (4th ed.), §§ 72, 87–89; Liszt (3d ed.), § 9, 26–27; 1 F. de Martens, §§ 99–100; G. F. de Martens, §§ 39–41; 2 Mérignhac, 393–398, 587–597; * 1 Moore, *Digest*, §§ 134–143, 153; * 1 Nys, 437–474; 1 Oppenheim, §§ 179–181, 191–197; *Ibid.*, in 1 *Zeitschrift* (1906); 1 Ortolan 140–152, 579–587; Perels, § 5; * 1 Phillimore §§ 180–206; 1 Piédelièvre, Nos. 403–418; Pomeroy, §§ 139–149, 155–157; 2 P.-Fodéré, Nos. 640–657, 661–681; * 1 Rivier, 143–144, 153–159, 230; *Scott, *Cases*, 132–154; Snow, *Cases*, 41–55; Stoerk, in 2 Holtzendorff, 410–428; Taylor, §§ 229–231; 1 Twiss, §§ 181–184, 189; Ullmann (2nd ed.), §§ 88, 106; * 1 Westlake, 187–197; Walker, *Manual*, §§ 17–18; 1 Wharton, *Digest*, §§ 27–29; Wheaton, §§ 181–190; Wilson, §§ 36–38, 40; Woolsey, §§ 60–61.

Free Navigation of Rivers. — Bluntschli, Nos. 311–315; * Bonfils (Fauchille), Nos. 520–530; Bry, Nos. 143-157; 1 Calvo, §§ 302–340; 1 Cobbett's *Cases* (3d ed.), 116–124; * Caratheodory, in 2 Holtzendorff, 279–377; Despagnet, Nos. 428–430; * Engelhardt, in 16 *R. D. I.* (1884), 360 ff.; *Ibid.*, *De régime conventionnel des fleuves int.* (1885); *Ibid.*, *Histoire du droit fluvial conventionnel* (1889); 2 Fiore, Nos. 755–797; Grotius, lib. II, c. 2, §§ 11–15; Hall (6th ed.), 131–140; 1 Halleck (Baker's 3d ed.), 171–179; Heffter, § 77; Lawrence (3d ed.), § 112; *Ibid.*, (4th ed.), § 92; *Liszt (3d. ed.), § 27. pp. 216–223; 1 and 2 F. de Martens, §§ 101, 157; 2 Mérignhac, 605–632; * 1 Moore, *Digest*, §§ 130–131; Neumann, §§ 22–23; 1 and 2 Nys, 423–437 and 109–131; 1 Oppenheim, §§ 176–178; * 1 Phillimore, §§ 155–171; Pomeroy, §§ 129–138; 2 P.-Fodéré, Nos. 682–747; 1 Piédelièvre, Nos. 376–384; * 1 Rivier, 142, 221–229; * Schuyler, *Am. Diplomacy*, 265–366; Snow, *Cases*, 32–41; Taylor, §§ 233–241; 1 Twiss, § 145; * Ullmann (2d ed.), § 105; Vattel, liv. II, §§ 123–134; * 1 Westlake, ch. 7, pp. 142–159; 1 Wharton, *Digest*, § 30; * Wheaton, §§ 192–205; *Ibid.*, *History*, 498–517; Wilson, §§ 39, 40; Woolsey, § 62.

CHAPTER XIV

THE OPEN SEA

THE FREEDOM OF THE OPEN SEA

202. **History of the Freedom of the Open Sea.** — During Antiquity and the early Middle Ages, the open sea was theoretically free and common to the use of all mankind,[1] though by no means free from depredation by pirates even under the rule of the Roman Empire. But owing to the universal prevalence of piracy and the revival of commerce during the Later Middle Ages, the leading maritime States of Europe claimed territorial jurisdiction over adjacent seas. Thus Venice and Genoa respectively laid claim to the Adriatic and the Ligurian Seas, Portugal regarded herself as sovereign over the whole of the Indian and the southern portion of the Atlantic Ocean, and Spain preferred the modest claim of sovereignty over the Pacific Ocean and the Gulf of Mexico. Sweden and Denmark were apparently satisfied with the Baltic and the Arctic regions, but England claimed the Narrow Seas, the North Sea, and the Atlantic from Cape Finisterre in Spain to Stadland in Norway.

These enormous pretentions led to a great controversy[2] on the freedom of the sea to which the most notable contributions were the *Mare liberum* by Hugo Grotius, in 1609, and the *Mare clausum* by John Selden, written in 1618 but not published before 1635. The main contention of Grotius was that the sea is by nature incapable of appropriation or occupation. This was denied by Selden, who claimed that portions of the sea had actually been appropriated, especially by England.

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[1] This was at least the view of the Roman jurists, who are supposed to have derived the doctrine from the Rhodian Laws of the Sea.

[2] Thus Gentilis defended the Spanish and English claims in a work entitled *Advocatio Hispanica* (1613). In the same year William Welwood defended the English claims in a work entitled *De dominio maris*. In 1635 Sir John Burroughs published his *Sovereignty of the British Seas*. In 1676 Sarpi published a book in defense of the claims of Venice to the Adriatic. The work of Grotius written in behalf of Holland was directed against the exorbitant claims of Portugal. Selden's work (published in 1635), was an official defense of the claims of England to the northern seas. I Oppenheim, § 250. See Nys, *Les origines*, 379-387, for additional information regarding this great controversy.

Very interesting is the reply of Queen Elizabeth to the Spanish envoy Mendoza who complained (in 1580) of the intrusion of English vessels in East Indian waters.

The final victory for the freedom of the open sea may be said to have been won[3] by 1824, when Great Britain[4] joined with the United States in protesting against the claim of Russia to the exclusive use of the waters of the Behring Sea within 100 Italian miles of the Alaskan and Siberian coasts, or islands belonging to Russia.[5]

The great queen refused to admit any right in Spain to debar her subjects from trade, or from "freely navigating that vast ocean, seeing the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof." Cited by Hall (6th ed.), p. 143.

[3] Special mention should be made of the important book by Bynkershoek, *De dominio maris*, published in 1702.

[4] In the early part of the nineteenth century, Great Britain had silently dropped her claim that foreign vessels should "strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty within His Majesty's seas" (which were supposed to extend to Cape Finisterre). Cited by Hall, (6th ed.), 147; and 1 Oppenheim, § 249.

[5] This claim, abandoned by Russia in 1824, was afterward (1886–1893) partly revived by the United States in respect to the seal fisheries; but it is a mistake to assert, as has frequently been done, that the United States Government based its claim mainly on the right of *mare clausum*.

True, this was the view taken by Judge Dawson of the District Court of Alaska (the *Onward*, etc.), and Chief Justice Fuller assumed (in the *Sayward* case) that the seizures were made on the ground of *mare clausum*; but Mr. Phelps (our minister at London) admitted that this so-called right was not applicable to the case, and Secretary Blaine, referring to the *mare clausum*, declared: "The Government has never claimed it and never desired it. It expressly disavows it." 1 Moore, *Digest*, § 903. His main argument was that the Canadian vessels which had been seized and confiscated were engaged in a pursuit that was in itself *contra bonos mores*, though in one of his notes to Lord Salisbury, he also asserted for the United States a claim to jurisdiction derived from Russia north of the 60th parallel of north latitude.

The main argument of the United States was, however, that of property in the seals and consequent right of protection on the high seas. This claim was based on the well-known fact that the seals habitually resort, for breeding purposes, to the Pribyloff Islands, belonging to the United States, from whence they go out on the high seas in search of food, and to which they regularly return during successive years.

The Court of Arbitration, to which all questions relating to the controversy were

203. **The Freedom of the Open Sea.** — It may, therefore, now be regarded as a universally accepted rule of International Law that the open sea[6] is free for the common use of all nations. Being practically insusceptible of effective occupation, it cannot be appropriated by any sovereignty or subjected to any jurisdiction; being indispensable for free intercourse, more particularly as an international highway, it is free and common to all. It is not so much *res nullius* as *res communis omnium.*

The freedom of the open sea has three main practical consequences:

204. (1) **The Right of Free Navigation. Collisions.** — The right of free navigation has certain necessary restrictions. For example, to prevent collisions, certain regulations respecting signs, signals, etc., are prescribed and observed.[7] But these derive

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referred, decided (in 1893) in favor of Great Britain on all points; but, for the better safeguarding of the seals, it drew up a series of rules which have unfortunately remained largely ineffective, owing mainly to the failure of Japan and Russia to agree to similar regulations.

On the *Behring Sea Controversy*, see Barclay, in 25 *R. D. I.*, 417 ff.; *Bonfils (Fauchille), Nos. 505 and 965 (see p. 291 of 5th ed. for references); 1 Cobbett, 124 ff.; Geffcken, in 22 *R. D. I.*, 230 ff., and 53 *Fortnightly Rev.*, (1890), 741 ff.; Engelhardt, in 26 *R. D. I.*, 388, and 5 *R. D. I. P.* (1899), 193 and 347 ff.; *Henderson, in *Am. Diplomatic Questions*, 3–61; Lawrence, *Principles* (3d ed.), § 106; *Ibid.* (4th ed.), § 86; Knott, in 27 *Am. Law. Rev.*, 684 ff.; *1 Moore, *Digest*, § 172; F. de Martens and Renault, in 1 *R. D. I. P.* (1894), 32 ff. and 44 ff.; *Snow, *Cases*, 521–528, and *Am. Diplomacy*, 471–509; Scott, *Cases*, 443–449, for the case of *La Ninfa*; Walker, *Science*, 175–204.

For good brief accounts of the *History of the Freedom of the Open Sea*, in international theory and practice, see Bonfils (Fauchille), Nos. 573–576; *Hall (6th ed.), 140–151; 2 Nys, 135–139; and 1 Oppenheim, §§ 248–251. For a complete account of the Behring Sea Controversy, see the *Proceedings of the Tribunal Arbitration* at Paris (1895) in 15 vols.

[6] The open sea (or "high seas") has been well defined as "the ocean, and all connecting arms and bays or other extensions thereof, not within the territorial limits of any nation whatever." Field, *Code*, Art. 53.

It includes such bodies of partially land-locked water as the Black Sea and the Sea of Marmora, which are connected with the open sea by navigable straits open to international navigation; but it does not include the Sea of Azov, which, though connected with the Black Sea by a navigable strait, is considered Russian territory. 1 Oppenheim, § 252.

[7] Such regulations are found in the laws of most countries, *e.g.* the British Merchant Shipping Act of 1873, the French Regulations of 1897, and the Regulations decreed by the Belgium King in 1850 which have been adopted by various maritime States. For the French text of these rules, see Perels (French trans., 1884), 373–380.

The Institute of International Law adopted a "Project for a Uniform Law of Maritime Collisions" in 1888. See *Tableau*, 91–93. The first rule is that if a collision has been caused by a fault, damages fall upon the ship on board of which the fault has their origin and sanction from municipal rather than International Law.

205. (2) **Free Fishing on the High Seas.** — Freedom of fishing on the high seas — a right which can only be limited through an international servitude[8] or by treaty. Thus, the fisheries on the North Sea are regulated by the Hague Convention of 1882,[9] and the Tribunal which arbitrated the Behring Sea Controversy adopted a series of regulations which were intended to prevent the extermination of the seals in that region.[10]

206. (3) **Submarine Cables.** — The right of laying and protecting submarine cables. In accordance with a wish expressed by the Institute of International Law in 1879[11] that the destruction

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been committed. In 1889 a Conference of leading maritime States met at Washington to consider this subject. Its discussions have had a great influence upon subsequent legislation.

On *Collisions*, see especially: * Bonfils (Fauchille), Nos. 578–580; * Bry, No. 180; 2 Fiore, Nos. 740–742; 2 Mérignhac, 523 ff. and 552; 2 Nys, 171–174; 1 Oppenheim, § 265; Perels, §§ 19–20 and pp. 373 ff.; 5 P.-Fodéré, Nos. 2362–2375.

For the text of an "International Convention for the Purpose of Establishing Uniformity in Certain Rules Regarding Collisions," see Supplement to 4 *A. J.* (1910), 121–125. For valuable editorial comment, see 4-6 *A. J.* (1910–12), 412 ff., 192 f., and 488 ff., respectively.

It has been claimed that there is an international legal obligation of assistance in case of collision, shipwreck, etc. There is undoubtedly a strong moral obligation, and some countries, *e.g.* the United States, France, and England, have made it a legal obligation in municipal law.

[8] Thus, until 1904, the French claimed to have an international servitude in the fisheries upon the banks of Newfoundland.

[9] See Bonfils, No. 582; 1 Oppenheim, § 282; and 5 P.-Fodéré, Nos. 2457–2458.

[10] See *supra*, note on p. 216. For the text of these regulations, which unfortunately have not been adopted by the other Powers, excepting Italy, see 1 Moore, *Digest*, § 172, pp. 914–916.

On *Fishery Rights on the Open Sea and in Territorial Waters* (with special reference to the N. E. Fisheries), see * 1 Cobbett, 153 ff.; Elliot, *The U.S. and the N.E. Fisheries* (1887); Isham, *The Fishery Question* (1887); * Lawrence, *Principles* (3d ed.), § 111; * 1 Moore, *Digest*, §§ 163 ff.; * *U.S.* v. *Great Britain* (1910 — case of *Atlantic Coast Fisheries*, in 4 *A. J.*, 218–274, 948 ff.).

A very curious exception to the rule laid down in the text is the British pearl fishery off Ceylon which extends to a distance of twenty miles from land. This is a "claim to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subjects of property and jurisdiction." Hall, *Foreign Jurisdiction of the British Crown*, 243 n. Westlake (I, 186) regards it as "an occupation of the bed of the sea." On the question whether the bed of the sea can be occupied, see Oppenheim, in 2 *Zeitschrift*, 1–16; 1 Piggott, *Nationality*, 25–28; and Robin, in 15 *R. D. I. P.* (1908), 50 ff.

[11] *Tableau*, 86; or 4 *Annuaire*, 394.

or injuring of submarine cables on the high seas be declared an international delinquency, a Conference at which 26 States were represented met at Paris in 1884 and signed a Convention which placed submarine cables under the collective guarantee of the Powers. According to the terms of this Convention, the rupture or injury of a submarine cable, whether due to voluntary action or to culpable negligence, is punishable by the laws and courts of the State to which the offending party belongs.[12]

II. Jurisdiction Over Vessels

207 **Nationality of Ships.**—The main objects of International Law on the high seas are ships, which are under the jurisdiction and protection of the State whose flag they fly and under the laws of which they are registered. Each State with a maritime flag stipulates the conditions under which vessels may obtain a certificate of registry or other document, such as a passport, sea-letter, etc., entitling them to the protection of her flag.[13]

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[12] Arts, 2, 8, and 12 of the Convention of 1884. Art. 15 is brief, but its importance has been overestimated. It reads: "It is understood that the stipulations of this convention shall in no wise affect the liberty of action of belligerents." This has been interpreted as giving unlimited freedom of action to belligerents in time of war, but it cannot free them from their general neutral obligations. See *infra*, § 397.

For the text of this treaty, see 1 Martens, *N. R. G.*, 2d series, 281. For a good summary, see Bonfils, No. 583.

On *Submarine Cables*, see * Bonfils (Fauchille), No. 583; Bry, No. 184; 2 Fiore, No. 822; * Jouhannaud, *Les câbles sous-marines* (1904); 2 Mérignhac, 532–535; 2 Nys, 170 f.; * 1 Oppenheim, § 286; Perels, 75 ff; Poinsard, *Études de droit int. conventionnel*, 55–60; 5 P.-Fodéré, No. 2548; * Renault, in 12 and 15 *R. D. I.*, 251 ff. and 619 ff.; 1 Rivier, 386–387; Roper, *Die Unterseekabel* (1910); Stoerk, in 2 Holtzendorff, 507 f.; * Wilson, *Submarine Telegraphic Cables* (1901).

[13] Without such flag as evidenced by her papers, a merchant vessel is entitled to no protection whatever. Nor is she entitled to protection if she sails under the flags and registry of more than one State. The other papers or documents usually required are the muster roll, the log book, the manifest of the cargo, bills of lading, and the charter party or contract between the owner and the one chartering the vessel.

In case of a warship, the word of the commander is usually held to be sufficient to establish the nationality of the vessel. In any case, the production of his commission would be conclusive evidence.

For details respecting conditions of nationality, ships, papers, etc., see Hall (3d ed.), Appendices 1 and 2; Holland, *Manual of Naval Prize Law*, Nos. 178–194; * 2 Moore, §§ 321–328; 5 P.-Fodéré, Nos. 2276–2294; and Snow, *Int. Law*, App. I.

208. **Theory of Exterritoriality as applied to Vessels.** — All vessels having a right to sail under the maritime or military flag of a State may be said to partake of its nationality and are under its protection and jurisdiction on the high seas. It has often been asserted that ships are floating portions of the State's territory, but this is a pure fiction which, though comparatively harmless, is wholly unnecessary. It might be said that vessels are treated *as though* they were floating parts of the territory of the State under whose flag they rightfully sail, but the jurisdiction to which they are subject may readily be justified on other and better grounds.[14]

209. **Jurisdiction over Public Vessels on the Open Sea and in Foreign Ports and Waters.** — The jurisdiction of a State over its warships on the open sea is absolute even in time of war, *i.e.* the right of search does not extend to them. This jurisdiction also extends to them in foreign ports and foreign territorial waters, where it is known as immunity from local jurisdiction.[15] Though public vessels have no *right* of entry into foreign ports and waters,[16] freedom of permission to enter is assumed in the absence of an express prohibition. Such privilege of entry constitutes an "implied license," which should be "construed as containing an exemption from the jurisdiction of the sovereign within whose territory she (the vessel) claims the rites of hospitality."[17]

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[14] Thus, a warship is an organ or direct representative of a State, and a merchantman partakes of the State's nationality. The sovereignty of a State over its vessels is therefore personal rather than territorial.

The great majority of the more modern authorities reject the fiction of exterritoriality, at least as applied to merchantmen. For good criticisms of this theory, see Hall (6th ed.), 244 ff.; (Harcourt), *Letters of Historicus*, 201–212; and Pietri, *Étude sur la fiction d'exterritorialité* (1895), ch. 2, and conclusion.

[15] This immunity also extends to organized land forces or armed troops where these have been given permission to use the territory of a State. These are under the jurisdiction and control of their own commanders. See *infra*, §§ 451–52.

[16] Except probably where such waters constitute an international passageway. See *supra*, § 196.

[17] Chief Justice Marshall, in *Exchange* v. *McFaddon* (1812), 7 Cranch, 116, and Scott, *Cases*, 208, 216. See also the opinions of Sir Robert Phillimore, in *The Constitution* (1879), 48 Law Journal, P. D. and A. 13; and of L .J. Brett, in *The Parlement Belge* (1878), Law Rep., 5 Probate Div., 197. These cases should be studied by every student. They may also be found in Scott, 218–225, and Snow, *Cases*, 103–120. For the *Status of Mail Ships*, see 2 Piggott, *Nationality*, 15 f.

This immunity is not, however, quite absolute. They must "demean themselves in a friendly manner" and observe harbor, port, sanitary, and neutrality regulations.

210. **Jurisdiction over Private Vessels on the Open Sea.** — The jurisdiction of a State over its private vessels on the high seas is less absolute and complete. Such vessels, in time of war, are subject to the rights of visit and search by belligerent warships; but in times of peace they are free from the exercise of these rights, except in case of a strong or well-grounded suspicion of piracy.[18] Other exceptions to complete freedom from interference on the high seas are based upon the right of self-defense as in the case of the *Virginius*,[19] and the probable right of hot pursuit on the high seas for violation of municipal law where the pursuit has begun in territorial waters.[20]

This jurisdiction extends to all goods and persons on board the vessel, whether native or foreign-born. A limited authority for the time being is vested in the captain. No foreign State has a right to interfere with his management or discipline, and he, in turn, is limited to the care and governance of his own vessel. Children born during the voyage, at least according to the law of some countries, partake of the ship's nationality, and crimes committed on board are punishable by the courts of the State to which the vessel belongs.[21]

But the remedy against an abuse of hospitality is diplomatic rather than judicial. In no case can judicial process be served on board such a vessel. It should be added that the crew, etc., of a public vessel are subject to local jurisdiction for offenses committed on shore. See 2 Moore, *Digest*, § 256.

[18] A limited right of visit and search is granted by treaty in a few cases. The most important of these is for the regulation of the slave trade. See *infra*, § 216. On the "Prohibition of Visit and Search in Time of Peace," see 2 Moore, *Digest*, § 309.

Even leading English authorities now admit that there was no warrant for the exercise of these rights by Great Britain to secure the impressment of native-born seamen, found on board American vessels in the early part of the 19th century. On the *Impressment of Seamen*, see especially Adams, *History of the U.S. under Jefferson and Madison* (see index); Foster, *Am. Diplomacy*, 235–238; * 2 Moore, *Digest*, §§ 317–320; 3 Wharton, *Digest*, § 331; Walker, *Science*, 124 ff.; Dana's Wheaton, §§ 108–109 and note 67.

Several authorities (*e.g.* 3 Phillimore, §§ 323–326, and 5 P.-Fodéré, No. 2543) speak of a right of visit or of approach for verification of flag or inspection of papers; but such a right can hardly be said to exist, except in the possible case of a strong suspicion of piracy. See on this point, *The Marianna Flora*, 11 Wheat. 1, and Scott, 873. For the masterly reply of Secretary Webster to the British contention that there is a distinction between the rights of visit and search, see 2 Moore, *Digest*, pp. 935–939.

[19] See *supra*, § 132, note on pp. 145–146.

[20] See *supra*, § 194, note on pp. 199–200.

[21] "It is clear that an English ship on the high sea, out of any foreign country,

211. **Jurisdiction over Private Vessels in Foreign Ports and Waters.** — It has also been claimed that immunity from local jurisdiction extends to private vessels in foreign ports and waters. There is, it is true, customary immunity for all offenses which merely affect the crew or internal discipline of the ship or which are of such a character as not to disturb the peace of the port; but this appears to be a usage based on comity or convention[22] rather than a strict rule of International Law. This so-called "French rule" is, however, a very convenient and desirable practice from the standpoint of commercial interests, and deserves the heartiest commendation and support.[23]

212. **Jurisdiction over Cases Arising from Salvage or Collision.** — As a rule admiralty courts will decline to assume jurisdiction

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is subject to the laws of England; and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil." *Regina* v. *Lesley* (1860), Bell's Crown Cases, 220, and Scott, 337. For other leading cases, see Scott, 331–342, and Snow, 184–193.

A most interesting and important case not found in Scott is that of *John Anderson*, reported in 1 Moore, *Digest*, pp. 932–935, and 1 Wharton, *Digest*, 123–125.

[22] See especially 2 Piggott, *Nationality*, 17–32, for the English law and discussion of doubtful or controverted points. Exclusive jurisdiction over matters that concern only the internal order or discipline of merchantmen (including disputes as to wages) are frequently conferred upon consuls by consular conventions. For the law and practice of the United States, see 2 Moore, *Digest*, § 206. In *Ellis* v. *Mitchell* (1874) the Supreme Court of Hongkong held that the American consul could not settle a dispute as to seamen's wages in the absence of express authority under treaty. See Scott, 234; or Snow, 133.

[23] This rule appears to be of French origin. See *The Newton and the Sally* and the *Jally* or the *Tempest*, Snow, *Cases*, 121–123; 1 Ortolan, 293–298 and 441–455; and Wheaton, § 103.

The leading American case is that of *Wildenhus* (1886) (120 U.S. Rep. 1, and Scott 225) in which the French cases cited above are reviewed. In this case murder between decks of the Belgian steamer *Noordland* moored to a dock in Jersey City was held to be a crime which affected the peace and tranquillity of the port. (There was a convention of the character above described between Belgium and the United States.) *Cf.* the *L'anemone* (1875) (Snow, 124–125) in which the Supreme Court of Mexico held that the murder of a Frenchman by another on board a French merchant vessel in a Mexican port was not necessarily a disturbance of the peace of the port. In *The Tempest* (cited above) murder was held to be such a crime by the Court of Cassation in France.

A most interesting case in which three States had concurrent jurisdiction is that of *Regina* v. *Anderson* (1868), 11 Cox, C. C., 198 and Scott, 331. It is that of murder by an American citizen on a British merchant vessel in French waters.

In 1897 the Institute of International Law adopted a "Project of Regulations for Legal Régime of Ships and their Equipages in Foreign Ports." 16 *Annuaire*, 231–241. The Institute adopted the French Rule (Art. 29) as an exception to the principle of territorial jurisdiction, which was strictly upheld (Art. 28).

over disputes concerning mariners' wages in a foreign vessel, but they may decide cases of salvage or collision between foreigners where the questions at issue are *communis juris*.[24]

III. Piracy

213. **Definition of Piracy.** — Piracy consists of an act or acts of violence adequate in degree and committed with piratical intent on the open sea by a private vessel,[25] without authority from any State or belligerent community.[26]

214. **Marks of Piracy.** — The following marks or characteristics of a piratical act should be emphasized: (1) It must be an overt act of violence adequate in degree.[27] It is usually, though not necessarily, an act of depredation committed with intent to plunder (*animus furandi* or *lucri causa*) and the pirate is nearly always a sea robber. (2) It must be committed on the open sea or at least outside the territorial jurisdiction of any State. Opinions differ [28] as to whether piracy includes descents from the

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[24] In the case of the British ship *Reliance* (1848) (1 Abbott's Adm. Rep., 317), the United States Circuit Court for the Southern District of New York declared: "The admiralty courts of the United States will decline jurisdiction of controversies arising between foreign masters and owners unless the voyage has been broken up or the seamen unlawfully discharged." The *Reliance*, having rescued goods from the wreck of another British vessel, had instituted proceedings for salvage. See Scott, *Cases*, 230; Snow, *Cases*, 129; and 2 Moore, *Digest*, 294.

In the case of the *Belgenland* (1884) (114 U.S. Rep. 355; see also Snow, 189, and Scott, 338), which grew out of a collision, the Supreme Court of the United States assumed jurisdiction. For references to other cases of this character, see note in Snow, 132, and Scott, 233. See especially 2 Moore, *Digest*, § 205. For an International Convention concerning "Assistance at Sea and Salvage," signed at Brussels in 1910, see Supplement to 4 *A. J.* (1910), 126 ff. For valuable editorial comment, see 4–6 *A. J.* (1910–12), 412 ff., 192 f., and 488 ff., respectively.

In 1873 Secretary Hamilton Fish complained of the jurisdiction over disputes between American masters and mariners exercised by the local common law courts of Liverpool. See 2 Moore, 293 and Snow's note referred to above.

[25] Or by the mutinous crew or passengers against their own vessel for the purpose of converting it to their own use.

[26] See note to *U. S.* v. *Smith* (1820), 5 Wheaton, 153, 160–183, for various definitions of piracy, collected by Judge Story. The other leading American cases are *U. S.* v. *Palmer* (1818), 3 Wheaton, 610; *U. S.* v. *Klintock* (1820), 5 Wheaton, 144; and *U. S.* v. *Pirates* (1820), 5 Wheaton, 184. The earlier definitions of piracy are inadequate rather than incorrect.

[27] For instance, robbery, murder, destruction by fire, etc. It would not include such acts as petty larceny or a mere threat.

[28] Hall (6th ed., p. 256), and Lawrence (4th ed., p. 233) agree that piracy may include descent from the sea and depredations upon traders on an unappropriated

sea upon the coast for purposes of kidnapping or plunder, but it certainly must be directly connected with the sea. (3) It must be piratical and non-political in motive and unauthorized by any State or insurgent community.[29] Consequently, insurgent vessels should not be regarded as pirates unless they commit depredations against neutral commerce.[30]

island; and Hall even maintains that though piracy "cannot take place independently of the sea," "a pirate does not so lose his piratical character by landing within State territory that piratical acts done on shore cease to be piratical." Lawrence, in dissenting from this latter view, justly observes: "Surely the fact that the crime was committed within territorial jurisdiction would make the perpetrators amenable to the law of the State, not to the provisions of an international code." Westlake (I, 178) agrees with Lawrence, whose view on this point is undoubtedly the correct one. Oppenheim (I, § 277) denies that acts of violence committed by descent from the open sea can ever be considered piracy.

[29] The acceptance of commissions from both belligerents is deemed equivalent to a total lack of authority, but acts done in excess of authority are not piracy. However, if an insurgent vessel knowingly continues hostilities after the government she serves has ceased to exist, her acts may be regarded as piratical. For the case of the *Shenandoah*, see Lawrence, *Principles* (4th ed.), p. 235.

[30] The main case cited in contravention of this view is that of the *U. S.* v. *The Ambrose Light* (1885), 25 Fed. Rep. 408; Scott, 346; and Snow, 200, in which the U. S. District Court for the Southern District of New York held that a vessel found on the high seas in the hands of insurgents who had not been recognized as belligerents by any independent nation, is technically piratical. But "the judgment in the case of the *Ambrose Light* has called forth much adverse criticism; and on the whole the weight of opinion would seem to be against the position that insurgent vessels not molesting the ships of other nations may be treated as pirates. See a criticism of this case by Mr. Francis Wharton in 3 Wharton's *Digest*, p. 469." Snow's note in *Cases*, on p. 204, and in Scott, 350.

Westlake (I, 180) calls attention to the fact that the court made the following statement as to the grounds of its decision: "When a seizure has been made by the navy department under the regulations, and the case is prosecuted before the court by the government itself, claiming *summum jus* — its extreme rights — the court is bound to apply to the case the strict technical rules of International Law." The court also stated that "where insurgents conduct an armed strife for political ends, and avoid any infringement or menace of the rights of foreign nations on the high seas, the modern practice is, in the absence of treaty stipulations or other special ties, to take no notice of the contest."

It should be added that the ship was released on the ground that the Secretary of State had impliedly recognized a state of war by his note of April 24, 1885, to the Columbian Minister — an inference which Secretary Bayard denied. See 2 Moore, *Digest*, p. 1099. On the case of the *Ambrose Light*, see especially 2 Moore, § 332, and Wharton, § 381.

The other cases sometimes cited in contravention of the view upheld in the text are those of *The Magellan Pirates* (1853), 1 Spinks Eccl. and Adm. Rep. 81, and Scott, 351; and *The Huascar* (1877), 2 Moore, p. 1086, and 3 Wharton, 474.

In *The Magellan Pirates*, Dr. Lushington held that certain Chilean insurgents, who had seized a British and an American vessel and appropriated treasure found

215. **Jurisdiction over Pirates.** — "Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed [?] vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals."[31] It was formerly customary to exercise

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on board one of these vessels, were pirates, but it was not on the ground that they were insurgents. The learned judge said: "It does not follow that rebels and insurgents may not commit piratical acts against subjects of other States, especially if such acts were in no degree connected with the insurrection or rebellion. See 1 Phillimore, § 360, for a fuller report of this case.

The Huascar was a Peruvian monitor whose crew had revolted in 1877 and declared for the insurgent Government. It stopped several British vessels and had taken coal from one of them, and several officers from the other. After an unsuccessful attempt to capture her on the part of a British cruiser, she subsequently surrendered to Peru, who claimed an indemnity from Great Britain. In the controversy which followed, the British Government maintained that the *Huascar* was technically a pirate. On this interesting case, see 1 Calvo, § 504; Hall (6th ed.), 261; 1 Halleck (3d ed.), 447–449 n.; Lawrence (4th ed.), pp. 235–236; * Moore, § 1086; 5 P.-Fodéré, No. 2512; Snow, *Cases*, 208; Walker, *Manual*, 56–59.

In the case of the *Montezuma* (1877), a vessel in the service of the Cuban insurgents which attacked Spanish merchantmen in the Rio de la Plata, the Brazilian Government refused to regard as a pirate a ship which confined its hostile acts to Spanish vessels. See 1 Calvo, § 502, and Snow, *Cases*, 206 ff. See also in support of this view, *The Republic of Bolivia*, etc. (1908–1909), reported in 3 *Zeitschrift*, 165 ff., 341 ff.

England, France, and Germany took a similar view of their rights and duties when the Spanish Government declared the Spanish squadron at Carthagena, which had fallen into the hands of insurgents, to be piratical. 1 Calvo, §§ 497–500. This was also the view of Secretary Bayard in his correspondence with the Columbian Government. See 1 Moore, § 332.

The parent State may, of course, treat rebels or insurgents as pirates by municipal law, but they are not pirates *jure gentium*. The piratical intent is wholly lacking. It is a perversion of the original and essential meaning of piracy to regard them as such. Recognized belligerents should not be treated as pirates even by the parent State, for they have acquired an international status which should be respected.

[31] Wheaton, § 124. This is an admirable statement of the law of piracy. The only modification it appears to need is the omission of the word *armed* before *vessels*. A few German writers (see 1 Oppenheim, p. 330 n., for references) claim that only warships may seize pirates, but this view is probably incorrect. Of course only armed vessels would be apt to venture to attack them.

The text should not be interpreted to mean that pirates can only be tried and punished in the jurisdiction of the State whose vessel has captured them. For, as Wheaton remarks in the next paragraph: "Piracy, under the law of nations, may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed."

a summary jurisdiction on the spot, but it would seem that this cannot now be done, unless it is impossible to bring them into the nearest home port for trial. They may be tried by any competent court, and piracy is usually regarded as a capital crime.[32]

It is pretty generally agreed that the warships of all nations [33] have the right of approach for the purpose of verifying the flag in case of suspicious conduct on the part of a vessel on the high seas, and that they may exercise the right of visit and search if there is grave reason for suspicion. But the exercise of this right on insufficient grounds may furnish a good cause for complaint, and even be made the basis of a claim for damages. "With regard to property captured by pirates, it is a rule of the Law of Nations, derived from Roman Law, that it must be presumed never to have been divested from its original owners. On recapture, the property revests in the former owner, although salvage may be payable."[34]

IV. The Slave Trade

216. **The Slave Trade.** — It is a serious reflection upon our civilization that the slave trade was permitted to flourish almost unchecked until the close of the Napoleonic wars. The main credit for having undertaken a crusade against this fearful traffic belongs to England,[35] which secured a declaration in favor of the abolition of this "scourge which has so long desolated Africa, degraded Europe, and afflicted humanity" at the Congress of Vienna in 1815, and again at Verona in 1822. The United States joined the crusade in 1820 through an Act of Congress which declared the slave-trade piracy — a doctrine which found

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[32] However, this is not necessarily the case. It should also be said that a State is not obliged to punish piracy. "According to the German Criminal Code, piracy committed by foreigners against foreign vessels cannot be punished by German courts." 1 Oppenheim, 330–331 n.

[33] Judge Story, in the *Marianna Flora*, 11 Wheat. 1.

[34] Cobbett's *Cases* (2d ed.), 130. *Cf.* 1 Oppenheim, § 279.

[35] The English Prize Courts had already refused restitution in two cases of American vessels engaged in the slave trade on the ground that it is a "trade which, being unprotected by the domestic regulations of their legislature and Government, subjects the vessel engaged in it to a sentence of condemnation." The *Amédie*, (1810), 1 Aeton, 240, and *The Fortuna* (1811), 1 Dodson, 81. See Dana's Wheaton, §§ 128–129 and note 86, and 2 Moore, § 310, pp. 914–915.

The British Parliament had abolished the slave trade in 1807.

its way into a number of laws and treaties, but which had been repudiated by the highest authorites[36] and found no warrant in the Law of Nations.

The great obstacle encountered by England in her efforts to suppress the slave trade was opposition to the exercise of the right of visit and search in time of peace, more particularly on the part of France and the United States. It was not before 1841 that she succeeded in negotiating the so-called Quintuple Treaty with France,[37] Prussia, Austria, and Russia granting a reciprocal right of search of vessels suspected of slave trading and punishing it as piracy. But the French Chamber of Deputies refused to ratify the treaty, and would only consent (in the treaty of 1845) to a right of visit for a verification of the flag and papers. By 1850 England had concluded nearly 50 treaties for the suppression of slave trading.[38] But the United States remained obstinate, and it was only in 1862, after Great Britain had officially renounced all claim to the rights of visit and search,[39] that the United States agreed to a treaty granting the mutual rights of detention, search, and seizure of merchantmen suspected of slave trading within 200 miles of the African coast and 30 leagues of the coast of Cuba.[40]

The abolition of slavery in the various States of America and in Cuba finally put an end to the West African slave trade; but there still remained the trade on the East African coast and the overland traffic. The fourteen States (including the United States), which signed the General Act of the Conference of Berlin concerning the Congo, (1884–1885), obligated themselves "to strive for the suppression of slavery and especially of the negro slave trade" (Art. 6); and Article 9 declared:

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[36] The leading case is that of *Le Louis* (1817, 2 Dodson, 210, and Scott, 352) one of Sir William Scott's (or Lord Stowell's) most famous decisions. *Le Louis* was a French vessel which was captured for slave trading in 1816 after the close of the Napoleonic wars. Lord Stowell denied the right of visit and search in time of peace except for piracy or in pursuance of a treaty (or possibly for purposes of self-defense); and maintained that the slave trade, though unjust and condemned by the law of England, was not legal piracy, nor was it legally a crime by the universal Law of Nations. See especially Wheaton, § 131, and Dana's note 86. This line of reasoning was followed by Chief Justice Marshall, in the case of the *The Antelope* (1825), 10 Wheaton, 66. See Wheaton, § 133, and Dana's note 88; and 2 Moore, 917–918.

[37] A very limited right of search had been mutually granted by the treaties of 1831 and 1833 between France and England.

[38] See the lists in 1 Phillimore, § 308, and 1 Halleck (Baker's 3d ed.), 254–255.

[39] This was in 1858. The renunciation was made by Lord Malmesbury who acted on the advice of the law officers of the Crown. 2 Moore, *Digest*, pp. 943–945. But the United States had (in 1842) agreed to maintain a fleet on the African coast to assist in the suppression of the African slave trade.

[40] "By an additional article of Feb. 17, 1863, this reciprocal right was extended to waters within 30 leagues of the islands of Madagascar, Porto Rico, and Santo Domingo." 2 Moore, p. 947.

"Conformably to the principles of the Law of Nations, as they are recognized by the Signatory Powers, the slave trade being interdicted, and as the operations which by land and sea, furnish slaves to the trade ought to be equally considered as interdicted, the Powers who exercise or shall exercise rights of sovereignty or an influence in the territories forming the conventional basin of the Congo, declare that these territories shall not serve either for a market or way of transit for the slaves of any race whatever. Each of these Powers engages itself to employ all the means in its power to put an end to this commerce and to punish those who are occupied in it."[41]

But these provisions were not effective, and the same Powers[42] which had participated in the African Conference of Berlin, signed (in 1890) the General Act of the Conference of Brussels called for the purpose of "putting an end to the crimes and devastations engendered by the traffic in African slaves, of efficiently protecting the aboriginal population of Africa, and of securing for that vast continent the benefits of peace and civilization."[43]

This convention concedes a limited right of visit and search[44] of vessels whose tonnage is less than 500 tons within a great maritime zone extending "on the one hand, between the coasts of the Indian Ocean (those of the Persian Gulf and of the Red Sea included), from Beloochistan to Cape Tangalane (Quilimane); and, on the other hand, a conventional line which first follows the meridian from Tangalane till it intersects the 26th degree of south latitude; it is then merged in this parallel, then passes around the island of Madagascar by the east, keeping 20 miles off the east and north shore, till it intersects the meridian at Cape Ambre. From this point the limit of the zone is determined by an oblique line, which extends to the coast of Beloochistan, passing 20 miles off Cape Ras-el-Had" (Art. 21).

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[41] Supplement to 3 *A. J.* (1909), 13–14.

[42] With the addition of the King of Belgium in his capacity of "Sovereign of the Independent State of the Congo," the Shah of Persia, and the Sultan of Zanzibar.

[43] See preamble to the General Act of the Berlin Conference as translated in Supplement to 3 *A. J.* (1909), 29 ff. The Act consists of 100 Articles and includes regulations for the suppression of the traffic on land as well as by sea.

[44] See Arts. 42 to 49 for the rules regulating the right of visit and search.

"For purposes of investigation and trial, each signatory Power engages to appoint in the zone in question territorial or consular authorities, or special delegates, competent to deal with the cases covered by the convention. Such a magistrate, when an armed arrested vessel is turned over to him, must proceed to make a full investigation according to the laws of his own country, in the presence of an officer belonging to the foreign cruiser. If it is proved that a flag has been frequently used, the arrested vessel is to remain at the disposal of the captor (Art. 51). If the examination shows an act connected with the slave trade, proved by the presence on board of slaves destined for sale, or any other offense connected with the slave trade, for which provision is made by special convention, the vessel and cargo are to remain sequestrated in charge of the magistrate. The captain and crew are then to be turned over for trial to the tribunal of the nation whose flag they used (Arts. 54–57), and the slaves are to be set at liberty as soon as judgment has been pronounced. Damages are to be allowed where a vessel has been illegally arrested" (Arts. 53, 58).[45]

An International Maritime Bureau, at which each of the signatory Powers may be represented by a delegate, shall be established at Zanzibar in order to "centralize all documents and information of a nature to facilitate the repression of the slave trade in the maritime zone" (Arts. 74–80).[46]

It would seem that there has been an honest effort on the part of the great majority of the Powers concerned to enforce the provisions of the Berlin Conference, and that, as a consequence, the African slave trade is practically extinct or merely sporadic by sea, and on its way to extinction, or at least greatly decreased, on land.[47]

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[45] 2 Moore, *Digest*, p. 950.

[46] Auxiliary bureaus may also be established and a "special office attached to the foreign office at Brussels" for the exchange of documents and information between the Powers (Arts. 81–85). The General Act of the Brussels Conference seems to have been ratified by all the signatory Powers; excepting that, owing to jealousy of the maritime power of Great Britain in the Indian Ocean, the French Chamber of Deputies refused to ratify Arts. 21–23 and 42–61 conceding the right of visit and search within the maritime zone.

In view of the work of the Brussels Conference and of the numerous treaties providing means for the prevention and punishment of this traffic, Lord Stowell's dictum that the slave trade is not a crime in the eyes of the Law of Nations can scarcely be said to be longer tenable. True it is not piracy, and slavery itself is a domestic institution which International Law does not, strictly speaking, condemn as illegal; but slave trading undoubtedly stands condemned, at least by the conventional Law of Nations.

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[47] See especially Queneuil, *La conférence de Bruxelles et ses resultats* (1907), chs. 7–9.

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CHAPTER XV

THE LAW OF THE AËRIAL SPACE IN TIME OF PEACE[1]

217. **Criticism of the Principles Formulated by the Institute of International Law.** — The invention of wireless telegraphy and recent improvements in the aeroplane and dirigible balloons have greatly extended the possibilities of international aërial communication and navigation, and have thus rendered necessary a discussion of the law of the so-called aërial domain in works on International Law.

During its session at Ghent in 1906, the Institute of International Law adopted the following principles: "The air is free. In time of peace and in time of war, States have over it only the rights necessary for their self-preservation."[2]

These principles, which were based upon the views of Fauchille[3] and accepted by a vote of 14 against 9, have been justly criticised. They are not in agreement with recent articles and monographs[4] on this subject, and do not answer the practical necessities either of aërial navigation or of wireless telegraphy, especially in time of war.

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[1] For the *Law of Aërial Warfare*, see *infra*, ch. 28.

[2] Article 1 of the Regulations adopted by the Institute for Aerostats and Wireless Telegraphy. 21 *Annuaire*, 327–329. *Cf.* Art. 3 of the Rules adopted at Madrid, in 1911, which states that "aërial circulation is free," saving the rights of the underlying States to take certain measures to insure security. 24 *Annuaire*, 346. The rules adopted in 1911 have no great importance.

The following is the text of the remaining articles adopted at Ghent in so far as they relate to the Law of Peace:

Art. 2. — In default of special arrangements, the rules applicable to ordinary telegraphic communication are applicable to communication by wireless telegraphy.

Art. 3. — Each State has the power (*faculté*), to the degree necessary for its security, to oppose, above its territory and its territorial waters, and to as great a height as it may find useful, the passage of Hertzian waves, whether these be emitted by apparatus belonging to the State or by private apparatus placed upon the earth, on board a vessel, or in a balloon.

Art. 4. — In case of the prohibition of communication by wireless telegraphy, the government should at once notify the other governments of the prohibition it has made.

[3] For the extremely interesting and suggestive views of M. Fauchille, the brilliant and versatile editor of the *Revue générale de droit int. public*, see Bonfils (Fauchille), Nos. 531, 1–10; *Le domain aérien*, in 8 *R. D. I. P.* (1901, 414–490; *Rapports a l'Institut de droit int.*, in 19 and 21 *Annuaire*, 19–86 and 76–87; and 17 *R. D. I. P* (1910), 55 ff.

218. **The Correct Principles.** — The correct principles were undoubtedly those formulated by Professor Westlake, who proposed the following alternative article at the above-named session of the Institute: "The State has a right of sovereignty over the aërial space above its soil, saving a right of inoffensive passage (usage) for balloons and other aërial machines and for communication by wireless telegraphy."[5]

219. **Territorial Sovereignty over the Aërial Space.** — From the standpoint of State or municipal law there can be little, if any, doubt that the aërial space is subject to the territorial sovereignty of the State underneath, at least as far as it can be utilized or controlled. "Justinian tells us that the air, like the high seas, is by natural right common to all. In the sense that all can breathe it in as they have opportunity this is certainly true; but it can hardly be accepted as a proposition of jurisprudence with respect to its use for the support of a vehicle of transportation."[6]

There existed, however, another principle of the Civil Law which declared that the lord of the soil was also lord of the heavens (*dominus soli*; *dominus cœli*),[7] which, with certain limitations and modifications, appears to have been incorporated into our common law.[8]

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[4] See especially * Baldwin and * Kuhn, in 4 *A. J.* (1910), 94 ff. and 109 ff.; Grünwald, *Das Luftschiff*, etc. (1908); Julliot, *De la proprieté du domain aérien* (1909); * Meurer, *Luftschiffahrtsrecht* (1909); Meyer, *Die Erschliessung des Luftraumes in ihrem rechtlichen Folgen* (1909); Schneeli, *Radiotelegraphie und Völkerrecht* (1908); * Fleischmann, *Grundgedanke eines Luftrechts* (1910); and Wilson, in 5 *Am. Pol. Sci. Rev.* (1011), 171 ff.

Meili, on the other hand, still supports the principles laid down by the Institute of International Law. See especially *Das Luftschiff* (1908) and *Die drahtlose Telegraphie* (1908).

[5] See 21 *Annuaire* (1906), 297–299. Westlake's article received but three votes at the time of its proposal (1906) to the Institute, but it has since won wide support. Nearly all of the above-named authorities are in substantial accord with its provisions.

[6] Baldwin, in 4 *A. J.* (1910), 95. He cites *Inst.* I, 1, *de rerum divisions*, § 1; and *Digest*, I, 8, *de divisione rerum*, § 2, 1.

[7] Julliot, *op. cit.*, p. 7. The Roman tradition of ownership in the aërial space was revived in the later Middle Ages and came down to Blackstone through Coke upon Littleton. Blackstone says: "Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum ejus est usque ad*

220. **Why Control is Necessary.** — Control of the aërial space by the territorial power underneath is necessary for various purposes in time of peace as well as in time of war. As far as the use of wireless telegraphy is concerned, it is necessary in order to oppose the passage of Herzian waves to the degree that the security or interests of the State may demand.[9] In respect to aërial navigation, it may be desirable or necessary in order to prevent espionage, to enforce the collection of customs duties, maintain sanitary and quarantine regulations, and prevent various crimes, particularly smuggling.

221. **The Nature of this Control.** — From the standpoint of International Law, it would seem that the State underneath has a *limited* right of territorial sovereignty or jurisdiction over the aërial space above, at least as far as it can be utilized or controlled.[10] The aërial space above the ocean or unoccupied territory is of course free; but this can hardly be claimed in respect to that portion of the atmosphere above the territorial waters (including the marginal seas) or above that part of

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cœlum is the maxim of the law. . . . So that the word 'land' includes not only the face of the earth, but everything under it, or over it," Cooley's *Blackstone* (4th ed.), Bk. II, p. 18. *Cf.* Coke upon Littleton (Thomas ed., 1836), Bk. II, ch. 1.

[8] It is expressly incorporated into the codes of Germany, France, and Switzerland. For citation and discussion of cases bearing on the rights of the owner of the soil in the United States, see Baldwin and Kuhn, in 4 *A. J.* (1910), 102 ff., and 123 ff. As far as the State is concerned, the theory of ownership has, of course, been abandoned for that of *imperium* or territorial sovereignty. Grünwald appears to stand alone in clinging to the theory of *dominium* or ownership.

For citations from the German, French, and Swiss codes, see 4 *A. J.* (1910), 98 f., 127 f.; Julliot, 7 f.; and Meurer, 13 ff.

[9] Art. 3 of the Rules of the Institute. See note 2, *supra*.

[10] Some publicists favor the division of the aërial space, for purposes of jurisdiction, into an upper and a lower zone. Rolland (13 *R. D. I. P.*, 58 ff.) holds the atmosphere to be territorial to a distance of 330 meters. Fauchille favors exclusive control for purposes of self-defense to a distance of 500 meters (17 *R. D. I. P.*, 60).

A number of the older authorities favor the rule or principle of the cannon shot; but, since modern aëronautic cannon are said to have a vertical range of 5500, 7400, and even 11,500 meters, this would render freedom in the upper zone wholly illusory. Besides, the analogy between the marine league or range of cannon shot as applied to the ocean and aërial space soon breaks down. In the case of the ocean the reasons for control decrease in proportion to the distance from the shore; in the case of aërial space, the danger (as, *e.g.* from the weight of falling bodies) may increase in proportion to the distance from the earth's surface.

the land surface of the earth which is inhabited by peoples organized into political communities.

The nature of this control appears to be analogous to that exercised over a State's territorial waters, more particularly the marginal seas, straits, and international rivers. Foreign airships should be granted a right of innocent or inoffensive passage; and, in general, the same rules must be applicable to them in the territorial atmosphere as are applied to foreign vessels in territorial waters. Their nationality will doubtless be determined by their flag or registry; and, though in principle subject to the jurisdiction of the State above whose territory they pass, they will be practically exempt from its criminal jurisdiction except in respect to crimes which affect the interests or disturb the peace of its inhabitants.[1]

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[1] This would at least be the case with private airships. Public airships will probably enjoy the rights and privileges of so-called exterritoriality, as in the case of public vessels or warships.

CHAPTER XVI

INDIVIDUALS AS OBJECTS OF INTERNATIONAL LAW

222. **Individuals as Objects of the Law of Nations.** — As stated in an earlier chapter,[1] individuals are objects rather than subjects of International Law. Inasmuch as their international rights and obligations are mainly secured and determined by the States or political communities to which they belong, their nationality or political allegiance is a matter of the first importance.

223. **What is Nationality?** — Nationality is usually defined[2] as the status or tie which unites an individual to a particular State. It involves reciprocal relations of allegiance and protection, and generally, though not always, implies that the individual clothed with a national character is a citizen[3] or subject of the State to which he owes allegiance. This national character is determined by municipal or State Law, and it frequently happens that several States lay claim to the allegiance of the same individual (this is a case of so-called double nationality) or that an individual is left without any nationality whatever (the Germans call it *Staatslos* or *Heimatlos*). In the former case conflicts between States are apt to arise which call

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[1] See *supra*, note on pp. 92–93 n. See, in addition, Diena in 16 *R. D. I. P.* (1909), 5–7 ff. See especially 1 Oppenheim, §§ 288–292, for a good discussion and references on this point.

[2] Nationality as here defined is a legal term and should be distinguished from the vague political or ethnological sense in which it is often used. Thus we speak of an individual as possessing German, Italian, Polish, or even Jewish nationality, without any necessary reference to a particular State.

[3] The terms *citizen* and *subject* have the same meaning in International Law. *Citizen* is usually applied to members of a State having a republican form of government; *subject* to those with monarchical institutions. Thus we speak of British subjects and American citizens. Since individuals who are not citizens in the strict or narrow sense are sometimes clothed with a national character, the term *national* is now preferred by many statesmen and publicists.

for the exercise of the greatest tact and forbearance. In the latter case injustice may result to those individuals who are in a sense outlaws from the standpoint of International Law.

I. NATIVE-BORN CITIZENS OR SUBJECTS

224. **Native-born Citizens.** — The most numerous and important class of individuals over whom a State claims jurisdiction are native-born citizens or subjects. But when it comes to the application of this term, there is a wide divergence in theory and practice.

All modern legislation supports the principle that children born within the territory of a State to parents who are themselves citizens are clothed with the nationality of their parents. But there is not the same unanimity in respect to those born outside the State's territory to parents who are citizens, nor in respect to those born within the State's territory to alien parents.

225. **The *jus soli*.** — According to the feudal principle of the *jus soli*,[4] nationality is primarily determined by the place or locality of birth. Consequently, children born to alien parents within the State's territory are clothed with its nationality. If carried out to its logical conclusion, this system would also require that those born outside the State's territory to parents who are citizens should not inherit the nationality of their parents. But this conclusion is not drawn nowadays.[5] Modern States are practically unanimous in claiming for children born abroad to its citizens the nationality of their parents.[6]

The *jus soli* prevails in principle in Great Britain, the United States, Portugal, and most of the States of Latin America.

226. **The *jus sanguinis*.** — According to the Roman and early Germanic principle of the *jus sanguinis*, nationality is based

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[4] The *jus soli* is of feudal origin and was originally based upon the territorial relation of a fief to its lord. During the Middle Ages it gradually supplanted the more ancient *jus sanguinis*, which was again given wide currency in Europe through the adoption of the Napoleonic Code.

[5] However, this seems to have been the doctrine of the French publicists of the old régime. See the citation from Bacquet, in Weiss, *Manuel de droit int. privé*, p. 7, and 1 *Traité*, 43.

[6] But many American States (including the United States) only actually claim those who show an intention to reside in the country of their origin. Others grant them the right of option after they have attained their majority.

primarily upon descent or parentage.[7] Thus, according to this system, children born outside a State's territory to parents who are citizens, are clothed with the nationality of their parents, whereas those born within a State's territory to alien parents are regarded as foreigners.

This system prevails in Germany, Austria, Hungary, Sweden, and Switzerland.

227. **Mixed Systems.** — A mixed system prevails in France, Belgium, Holland, Greece, Turkey, Russia, Spain, Italy, etc. In France, *e.g.* (which may be regarded as a type of this class of States), every child of a Frenchman is held to be of French nationality, whether born in France or abroad; whereas an individual born in France to alien parents, and not domiciled in France at the age of majority, is regarded as a foreigner. But until the completion of his twenty-second year, such an individual has the option of making an act of submission by declaring his intention to acquire a French domicile; and if he acquires such a domicile within a year after his act of submission, he may claim French nationality by means of a declaration which will be registered with the Ministry of Justice.[8]

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[7] The *jus sanguinis* was not merely a Roman and early Germanic conception, but this principle of inheritance or descent may be said to have been that of antiquity itself. As stated above, it was incorporated into the Napoleonic Code, and was thus given a wide currency in Europe.

The Civil Code of Napoleon (1804) does not declare in express terms that children inherit the nationality of their parents. Art. 9, § 1 gave to a child born to alien parents on French soil, and who is not domiciled in France at the time of his majority (those having French domicile being considered French unless they have made a contrary choice), the right to choose French nationality within a year after attaining his majority, provided he acquires a French domicile within a year after his declaration.

Art. 10, § 1 simply declares that "every child born of a Frenchman in a foreign country is French." The new Art 8, § 1° of the Civil Code (law of 1889) is thus conceived: "Any individual born of a Frenchman in France or abroad is French." For the text of the law of 1889, see Andreani, *La condition des étrangers en France* (1907), ch. 3, pp. 111 ff., or 2 Sieber, *Das Staatsburgerrecht*, etc. (1907), 86 ff.

"Every individual born in France to foreign parents (one of whom is himself born there) is French, saving the privilege (if it is the mother who is born in France) of declining French nationality within the year following his majority." Art. 1, § 3° of the law of 1893. See Andreani, p. 123. For an English translation of the laws of 1899 and 1893, see *Report on Citizenship*, etc., 72 House Doc., No. 326, 59th Cong., 2d sess. (1906–1907), 317 ff.

[8] Cogordan, *La nationalité* (2d ed.), 81. For a commentary on Art. 9 of the Civil Code and Art. 8, § 4° of the law of 1889, see Cogordan, § 5. This article is slightly modified by the law of 1893. See Andreani, 123 f.

Every individual born in France to a foreigner and who is domiciled there at the time of his majority is regarded as French unless, within the year following his majority, he has declined French nationality and proved that he has preserved the nationality of his parents by means of an attestation drawn up in due form by his government.[9]

Some special comments on the practice of Great Britain and the United States may be found useful.

228. **Native-born British Subjects.** — England formerly stood almost exclusively upon the ground of the *jus soli*, and claimed the allegiance of all children born to aliens on British soil or within British jurisdiction,[10] as well as the children born to British subjects abroad. But since 1870 the right of legitimate children born to alien parents within British jurisdiction to acquire the nationality of their parents by means of a declaration of alienage at the age of majority, is recognized.

Since the passage of the Naturalization Act of 1870, the following may be regarded as native-born British subjects:

"(1) Persons born within the British dominions or on board British ships on the high seas or in foreign territorial waters, whether born of British or alien parents, and whether legitimate or illegitimate, provided that, if legitimate children born of alien parents, and if of the age of twenty-one years or more, they have not made a declaration of alienage, in accordance with the provisions of the Naturalization Act of 1870.[11]

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[9] Cogordan, 84. He must also produce a certificate showing that he has complied with the military law of his country.

Some minor points in the laws on nationality may here be noted: The nationality of foundlings is governed by the *jus soli*. Illegitimate children usually inherit the nationality of their mother, though they may acquire the nationality of the father through subsequent legitimation. The nationality of the wife is generally merged in that of her husband. Thus, when a woman marries a foreigner, she usually loses her former nationality.

[10] There were, however, several exceptions: (1) Children of foreign ambassadors. (2) Children born to an enemy father at a place within the British dominions, but in military occupation of an enemy State. (3) Children of persons attainted of high treason, or in the actual service of any foreign prince or State at enmity with Great Britain at the time of the birth of such children. See Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), 18–19 n.

Children born abroad to any whose fathers are in the military service of the Crown have also been considered British subjects, at least since the statute of Edward III, as also those born on board a British ship on the high seas. Piggott, *Nationality*, I, 42–46.

[11] Thus, "a child born of foreign parents even during an accidental stay is fully,

"(2) Legitimate children and grandchildren by male descent, of British subjects, born out of the dominions of the crown.[12]

"(3) Persons whose father, being a British subject, or whose mother being a British subject and a widow, has become naturalized during the infancy of such persons in a country under the laws of which infant children do not become naturalized by the naturalization of their parents; and like persons, notwithstanding that they have become naturalized by the naturalization of their parents, if they have not during infancy been *resident*,[13] within the meaning of section 10 of the Act of 1870, in the country where the father or mother is naturalized." [14]

229. **Native-born Citizens of the United States.** — In the United States, the principle of *jus soli* of the common law was followed, and it was held that "children born in the United States of alien parents, who have never been naturalized, are native citizens of the United States." [15]

The Civil Rights Act of 1866 (the first law containing a provision on this subject) declared: "All persons born in the United States *and not subject to any foreign Power*, excluding Indians not taxed, are declared to be citizens of the United States." [16] But the modifying phrase set in italics appears to

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and until the age of twenty-one years, irretrievably a British subject." Hall, *op. cit.*, 20.

[12] "4 Geo. II, c. 21, and 13 Geo. III, c. 21. The meaning of these Acts was decided in *De Geer* v. *Stone* (22 Ch. D., 243) to be that 'the grandchild born abroad, whose father was also born abroad, being respectively grandchild and child of a man who was by the common law a natural born British subject, would be himself a natural born British subject, but that his children born abroad would be aliens.'" Hall, 19 n. But Great Britain does not pretend to afford protection to such subjects if claimed by the country in which they are born. *Ibid.*, 66.

[13] On the probable meaning of the term *resident* in this connection, see Hall, *Jurisdiction*, etc., § 17.

[14] *Ibid.*, pp. 18–19. Subject to certain exceptions, such as foreign naturalization or a declaration of alienage, the following are the main classes of natural born British subjects: (*a*) Children born within the dominions. (*b*) Children born abroad of a father who falls within category *a*. (*c*) Children born abroad of a person who falls within category *b*. For this classification, see 1 Piggott, *Nationality*, 53.

[15] 3 Moore, *Digest*, p. 277.

[16] *Revised Statutes*, § 1992. See Moore, *op cit.* The *italicized* phrase appears to have meant that if it be shown that one born in the United States owes allegiance to another State, he is not a citizen of the United States. Art. "Nationality,"

have been rendered null and void by the adoption of the Fourteenth Amendment to the Constitution of the United States: "All persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."[17]

The Act of Congress of 1855 declared: "All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; *but the rights of citizenship shall not descend to children whose fathers never resided in the United States.*"[18]

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in 2 Lalor's *Cyclopedia*. A different view is held by Van Dyne, *Citizenship*, No. 2.

For a review of the juridical *dicta* to the effect that the phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment also included children who bore a foreign allegiance *jure sanguinis*, see Moore's *Am. Notes* in the first edition of Dicey's *Conflict of Laws* (1896), 201. These valuable notes have unfortunately been omitted in the second edition (1908) of this excellent work.

[17] The phrase set in *italics* does not appear to exclude children subject to a foreign Power by reason of a *jure sanguinis* allegiance, but merely excludes children born in the United States of diplomatic agents and Indians still living in tribal relations. It is also believed to exclude children of alien enemies in hostile occupation of the United States.

In the leading case of *United States* v. *Wong Kim Ark* (1988), 169 U. S. 649, our Supreme Court held that "a child born in the United States, whose parents, though of Chinese descent and subjects of the Emperor of China, are domiciled in the United States, is a citizen of the United States by birth, within the meaning of the Fourteenth Amendment." 3 Moore, *Digest*, p. 280. See also *In re Look Tin Sing* (1884), 21 Fed. Rep. 905; * *Ex parte Chin King* (1888), 35 Fed. Rep. 354, and Scott *Cases*, 379; and the other cases cited in 3 Moore, 280, and 1 Willoughby, § 125.

The decisions of the Department of State do not appear always to have agreed with those of the courts. For example, in *Hausding's Case* (1885), Secretary Frelinghuysen supported Mr. Kasson, U. S. minister to Germany, in the opinion that one Ludwig Hausding, who was born in the United States of a Saxon subject, but who had resided in Saxony since his infancy, was not entitled to a passport as a citizen of the United States. And this in spite of the fact that his father had, subsequently to his birth, become a naturalized citizen of the United States. "The fact of birth under circumstances implying alien subjection, establishes of itself no right of citizenship." This case may possibly be harmonized with the Chinese cases, cited above, on the theory that Hausding had never shown any fixed or definite intention to return, such as was manifested in the case of the subjects of the Emperor of China. But the fact remains that the State Department gave the Fourteenth Amendment a different construction from that given by the Federal Courts. This former construction of the State Department has, however, since been abandoned.

On *Hausding's Case*, see 3 Moore, 278–279, and Snow, *Cases*, 222–223. For two other somewhat similar cases, see 3 Moore, 279–280.

[18] § 1993 of the Revised Statutes of the United States, incorporating the pro-

The Act of 1907 declares: "All children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."[19]

II. NATURALIZED CITIZENS OR SUBJECTS

230. **Naturalized Citizens.** — Another important class of citizens, especially in the United States, are naturalized citizens or subjects. These are "persons between whom and the State the tie of allegiance has been artificially created by a process termed naturalization."[20] "Naturalization in the narrower sense of the term, in contradistinction to naturalization through marriage, legitimation, option, domicile, and appointment as government official, may be defined as the reception of a foreigner into the citizenship of a State through a formal act on application of the individual."[21] It is in this narrower sense that we shall use the term.

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visions of the act of Feb. 10, 1855. See 3 Moore, p. 282. Hence an illegitimate child born abroad of an American woman is not a citizen of the United States. The provision set in *italics* does not apply to members in Turkey of a community of citizens of the United States (for these enjoy extraterritorial privileges), and "it is believed that the limitations of the act do not apply to a country like Samoa where citizens of the United States, although beyond the limits thereof, are not outside its jurisdiction, but subject thereto under express conventional provisions." 3 Moore, 287–288.

[19] § 6 of The Act of 1907 in "Reference to the Expatriation of Citizens and their Protection abroad. See Supplement to 1 *A. J.* (1907), 259; or Van Dyne, *Naturalization*, App., 440.

§ 5 of this Act declares: "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization of or resumption takes place during the minority of such child; *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

[20] Lawrence, *Principles* (3d ed.), § 115. *Cf. Ibid.* (4th ed.), § 95. It corresponds to the ancient practice of adoption.

[21] Slightly adapted from 1 Oppenheim, § 303. *Cf. Ibid.*, § 299. In the wider

Naturalization is regulated by municipal or State law, but it is of special importance to students and statesmen, since the conflict of legislation on the subject may give rise to serious international conflicts.

Some authorities and legislators have maintained that the individual has a natural right of expatriation, *i.e.* to transfer his allegiance and claim to protection from one sovereign to another at will, and that this right is guaranteed by the Law of Nations. The United States has especially championed this view since 1868,[22] even at times undertaking to protect its naturalized citi-

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sense, naturalization may take place without special formalities, as where a foreign wife acquires the nationality of her husband.

There is also a process of collective naturalization, as when a country or province is annexed or incorporated by another. See especially 3 Moore, *Digest*, §§ 379–380; and Van Dyne, *Naturalization*, ch. 4. Several of the Latin-American States, as, *e.g.* Brazil, Mexico, Peru, consider such acts as the purchase of real estate, or residence for a term of years, as *ipso facto* evidence of naturalization. 3 Moore, § 318; Hall, *Foreign Powers and Jurisdiction*, etc., 49–50 n.; and 2 Calvo, §§ 643–664 (on Venezuela).

[22] Roused to a fever heat of excitement by the refusal of England to grant the right of trial by mixed juries to naturalized American citizens accused of Irish (Fenian) outrages, Congress passed the famous Act of 1868 declaring expatriation to be "a natural and inherent right of all people," and denouncing as inconsistent with the fundamental principles of the republic "any declaration, instruction, opinion, order, or decision of any officers of this Government, which denies, restricts, impairs, or questions the right of expatriation." It was also enacted that "all naturalized citizens of the United States, while in foreign States, are entitled to, and shall receive from this Government the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances." 3 Moore, *Digest*, § 439, or Scott, *Cases*, 375.

Prior to 1868 the courts and legal authorities in the United States accepted the common-law doctrine that a subject or citizen cannot renounce his allegiance without the consent of his Government. See especially the *Case of MacDonald* (1747), and *William's Case*, Scott, *Cases*, 370 and 372; the judicial opinions on *Ballard's* and *Talbot's* citizenship, in 3 Moore, § 532. For references to the older authorities, see *Ibid.*, § 431, p. 552.

Not until 1845–1848, when James Buchanan was Secretary of State, did our State Department claim that naturalized American citizens were entitled to the same degree of protection as native-born citizens in the country of their origin. After 1848 Secretary Webster reverted to the earlier rule laid down in 1840 by Mr. Wheaton, minister to Prussia, in the case of Mr. *Knoche*, a naturalized American citizen who had been forced to enter the Prussian army after his return to Prussia. "Had you remained in the United States or visited any other foreign country except Prussia on your lawful business, you would have been protected by the American authorities at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicile and national character revert* (so long as you remain zens without respecting the rights of the country of their origin, but, within recent years, our Government appears to have abandoned its extreme and indefensible attitude in this matter.

in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated." 3 Moore, p. 564.

Replying to an inquiry whether M. Depierre (a native of France, but a naturalized citizen of the United States) could "expect the protection of this Government in that country, when proceeding thither with a passport" from the Department of State, Secretary Webster said in 1852: "If, as is understood to be the fact, the Government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services when found within French jurisdiction." 3 Moore, p. 567. Similar ground was taken by Secretary Everett in 1853, Secretary Marcy in 1855, and Attorney-General Cushing in 1856.

During Buchanan's Presidency, the State Department again changed its tone. In 1859, Secretary Cass instructed Mr. Wright, American Minister to Prussia, to demand the immediate discharge of *Christian Ernst*, a naturalized American citizen, from compulsory military service in Hanover on the ground that the offense charged — evasion of military service — had not been committed before the emigration of Ernst to the United States at the age of nineteen. In these instructions, which were issued in circular form to other Governments, President Buchanan (the views expressed were really his) took the broad ground that "the moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassable line separates him from his native country. . . . Should he return to his native country, he returns as an American citizen and in no other character. In order to entitle his original government to punish him for an offense, this must have been committed while he was subject and owed allegiance to that government. . . . It must have been of such a character that he might have been tried and punished for it at the moment of his departure." 3 Moore, pp. 574–575.

During the Civil War Secretary Seward permitted the controversy to rest. It was soon afterward revived in connection with the Fenian outrages in Ireland and led to the Act of 1868, cited above. In the same year the historian Bancroft, then United States Minister to Prussia, negotiated a Treaty of Naturalization with Prince Bismarck in behalf of the North German Confederation which had been formed in 1866 and which four years later (1870) developed into the German Empire. It was followed by the conclusion of similar treaties with other German States the same year (1868).

The Bancroft or German treaties provide for the reciprocal recognition of naturalization combined with five years' uninterrupted residence. But if the naturalized emigrant returns to the country of his origin, he is liable to punishment for offenses (such as evasion of military service) committed before his emigration unless the liability has ceased through prescription. If the returning emigrant renews, without intent to return, his residence in the old country, he shall be deemed to have renounced his naturalization in the new; and a presumption of an intention not to return and of consequent loss of the newly acquired nationality arises after a residence of more than two years in the old country.

For various Naturalization Conventions to which the United States is a party, see Van Dyne, *Naturalization*, App., 44 ff.

The Treaty of Naturalization between the United States and Great Britain (1870) merely provides for a reciprocal recognition of the naturalization of British

Though nearly all States now permit the expatriation of their citizens,[23] they do so at their own discretion. Consequently, the so-called right of expatriation is not a principle of International Law.

231. **Naturalization in Great Britain.** — Until 1870, England

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subjects or American citizens, and the resumption of British or American nationality. For commentary, see 1 Piggott, *Nationality*, ch. 17.

The United States has also concluded Treaties of Naturalization with Belgium (1868), Sweden and Norway (1869), Austria-Hungary (1870), Ecuador (1872), Denmark (1872), Hayti (1902), San Salvador (1908), Portugal (1908), Honduras (1908), Uruguay (1908), and Peru (1907). These treaties are mainly drawn on the line of the German treaties, referred to above. The treaties with San Salvador, Portugal, Uruguay, and Peru, which are of special interest as illustrating the present views of our Government, are printed in 2, 3, and 4 Supplement to *A. J.* (1908–1910), 342–343, 159–160, 284–285, 134–135 respectively.

Owing to their stringent enforcement of military conscription, our main conflicts have been with Germany, Austria-Hungary, and Russia. These countries frequently resort to expulsion of naturalized Americans even in apparent violation of treaty rights. But our Government appears now to have receded from the extreme and untenable positions which it has sometimes assumed, except in the case of the Russian Jews (1911).

For the subject-matter of this note, see especially 3 Moore, *Digest*, particularly §§ 390–407, 431–440, 453; Moore, *American Diplomacy*, ch. 7; and Art. on "Nationality," in 2 Lalor, *Cyclopedia*.

[23] Russia and Turkey seem to be the only countries which to-day deny to their natural-born citizens or subjects the right of expatriation without special permission of the Government. The Argentine Republic refuses to allow its citizens to separate from the State in any case.

French nationality may be lost through naturalization abroad, declination, acceptance of public office under a foreign government without permission of his own government, or the acceptance, without authorization of his government, of foreign military service.

German nationality may be lost by release, dismissal, marriage (in certain cases), legitimation, or residence of ten years abroad.

In Italy citizenship is lost by express renunciation and subsequent emigration, by naturalization in a foreign State without permission of the Italian Government, or by foreign military service. But expatriated Italians are not absolved from the obligations of military service.

By Austrian law those who emigrate with permission lose their character as Austrian subjects, and are regarded as foreigners; those emigrating without permission lose their rights as subjects of Austria, but their rights as naturalized foreigners are apparently disregarded.

Hungarian nationality is lost by liberation from allegiance granted by the State or by unauthorized and uninterrupted absence during ten years.

Spain recognizes the naturalization of Spaniards abroad, but claims that this does not free them from obligations to Spain, unless it shall have been obtained with the knowledge and consent of the Spanish government.

In most countries naturalization abroad frees the one naturalized from obligations toward the mother country.

For the subject matter of this note, see especially: Hall, *Foreign Jurisdiction*, held to the equally indefensible doctrine of perpetual allegiance — *nemo potest exuere patriam* — and refused to recognize any right of expatriation on the part of her subjects. But she abandoned this illiberal attitude in 1870, when she not only recognized the right of expatriation of her own subjects, but provided improved facilities for the naturalization of foreigners.[24]

"By the seventh section of the Naturalization Act of 1870, any alien who has resided in the United Kingdom for not less than five years, or who has been in the service of the Crown for a like period, and who *intends to reside*[25] in the United Kingdom or to serve under the Crown may, at the discretion of a Secretary of State, be granted a certificate of naturalization which carries with it all the rights and obligations of a British subject within the United Kingdom."[26]

"An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect."[27]

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etc., § 23; *Ibid.*, *Int. Law* (6th ed.), 227 ff.; and 3 Moore, *Digest*, §§ 441–465. See also Lehr, *La nationalité* (1909), Nos. 14–23, and *passim; Report on Citizenship, Expatriation, and Protection Abroad*, 72 House Doc., No. 326, 59th Cong. 2d sess. (1906–1907), 270 ff.; and Webster, *Naturalization*, 128 ff.

[24] Prior to 1844 an alien could only be naturalized by special Act of Parliament or by letters of denization. The Act of 1844 permitted naturalization at the discretion of a Secretary of State.

[25] It is doubtful whether the phrase *intends to reside* has any particular meaning or importance. In the case of *M. Bourgeoise* (L. R. 41 Ch. D., 310), who spent the remainder of his life in France after having been naturalized in England, it was not even mentioned. See 1 Piggott, *Nationality*, 101 f. and 122 ff.

[26] Hall, *Foreign Jurisdiction*, etc., § 18.

[27] § 7 of the Naturalization Act printed in Hall, App., 253; and 1 Piggott, 291. The meaning of this paragraph seems to be that naturalized British subjects are to have the same rights, etc., as native-born subjects, both at home and abroad, except in the country of their origin. But the phraseology, particularly the repetition of *United Kingdom*, is vague and ambiguous. See Hall, § 18; and 1 Piggott, 113–126.

In a Circular addressed (in 1874) to the Colonial Governments, it is stated that

Children born to naturalized parents in the United Kingdom are of course natural-born British subjects according to the *jus soli*, and those who become resident in the United Kingdom with their naturalized father, or with their mother if she is a widow at the time of her naturalization, are naturalized British subjects. But children born to naturalized parents abroad and continuing to reside there are presumably aliens.[28] Married women are deemed subjects of the State to which their husbands belong; consequently, they acquire the nationality of their naturalized husbands, at least in the United Kingdom.

232. **Loss of British Nationality.** — Since 1870, " the status of a British subject may be lost —

" (1) By natural-born British subjects of British origin:

" (*a*) Through [voluntary] naturalization in a foreign State;

" (*b*) By declaration of alienage, if born out of British dominions of a father being a British subject;

" (*c*) Through marriage, in the case of a woman, with an alien.

" (2) By natural-born British subjects of foreign origin, and by naturalized persons:

" (*a*) By declaration of alienage;

" (*b*) Through marriage, in the case of a woman, with an alien." [29]

233. **Naturalization in the United States.** — Beginning with the Act of 1790, Congress has passed various statutes for the naturalization of aliens. The present law, which was enacted on June 29, 1906, provides:

"Her Majesty's Government are advised by the Law Officers of the Crown that the operation of the above enactments is clearly confined to the United Kingdom, and that a certificate of naturalization, granted under either the Acts of 1844 or 1870, confers upon an alien no rights or privileges in a British Colony." Piggott, 119 and 129. Hall (*op. cit.*, p. 25) claims that "naturalized persons have been invariably regarded as occupying a position identical with that of natural-born subjects of the Crown in all States other than their State of origin."

[28] This is the opinion of Hall, § 19, and Dicey in 5 *Law Quar. Rev.*, 438. It is not shared by Westlake (I, 228 n.). Piggott (*Nationality*, I, 126) leaves one in doubt.

[29] Hall, *Foreign Jurisdiction*, etc., § 25. The Act of 1870 requires as conditions for recognition of the validity of the expatriation of British subjects that the act

(1) That an alien desiring to be naturalized "shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens,[30] or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is his *bona fide* intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty, of which the alien may at the time be citizen or subject."[31]

(2) Not less than two years nor more than seven years after he has made such declaration of intention,[32] he shall file a petition verified by the affidavits of at least two credible witnesses — citizens of the United States — setting forth that "he is not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to renounce, etc., . . . and that it is his intention to reside permanently in the United States. . . ."

(3) He shall, furthermore, "declare in open court that he

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be voluntary on the part of the individual, that he be not under any disability, and that he reside in the foreign State at the time of his naturalization; but it does not prescribe any formalities or rules, such as length of residence, etc. On the *Conditions of Naturalization*, *cf.* Hall, *op. cit.*, §§ 25–26, and 1 Piggott, 136 ff.

An especially valuable commentary on the Naturalization Act of 1870 is the *Report of the Interdepartmental Committee of 1901* (*Par. Paper* (1901, Cd. 723). It is printed in the *Report on Citizenship*, etc., 72 House Doc., No. 236, 59th Cong. 2d sess. (1906–1907), 343–361.

[30] Naturalization in the United States is a judicial act. For a list of courts having jurisdiction, see Van Dyne, *Naturalization*, App., 493 ff.

[31] Sec. 4 of the Act of 1906 (34 Stat. at L. 596) printed in Supplement 1 to *A. J.* (1907), 31 ff.; Van Dyne, *op. cit.*, 417 ff.; or *Naturalization Laws and Regulations*, Nov. 11, 1911, issued by the Department of Commerce and Labor.

[32] According to the law of 1906, the declaration of intention may be made immediately after the alien's arrival in the United States, but it must be made at least two years before his admission to citizenship. The life of the declaration is limited to seven years. In any case five years' residence in the United States and one year within the State or Territory where the application is made is necessary before a certificate of citizenship can be obtained.

will support the Constitution of the United States"; prove that "he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States . . ."; and, finally, that he expressly renounces any hereditary title or order of nobility which he may have borne in the State of his origin.[33]

234. **Persons Capable of Naturalization in the United States.** — Those capable of naturalization in the United States are "white persons" and "persons of African descent."[34]

It has been judicially held that neither Chinese, Japanese, Burmese, Hawaiians, nor American Indians can be naturalized under the statutes.[35] Alien women, whether married or unmarried, may be naturalized in the same manner and under the same conditions as alien men, and the naturalization of the husband

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There are several exceptions to these rules. No declaration is required and one year's residence is sufficient in the case of aliens who have performed honorable service in the army or navy of the United States. Widows and minor children of deceased aliens who have declared their intention may be naturalized without making such declaration. Residence in Hawaii, the Philippine Islands, or Porto Rico is accepted as fulfilling the five-year residence requirement. An exception is also made in favor of an alien seaman who has declared his intention and served three years on board a United States merchantman. He may at once be admitted to citizenship. Van Dyne, *op. cit.*, 61 ff., 74 ff.

[33] Sec. 4 of the Act of 1906, *op. cit.* Sec. 8 also provides that "no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language, "unless he is physically unable to speak."

Sec. 15 provides that "if any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent. . . ."

[34] "By the Acts of 1802 and 1824, only "free white persons" were capable of naturalization. By the Act of 1870, the benefits of the law were extended to "aliens of African descent." The law, as consolidated in the Revised Statutes, thus stands, embracing only "white persons" and persons of African descent." 3 Moore, *Digest*, p. 329.

[35] See especially 3 Moore, § 383; and Van Dyne, 40 ff. Alien enemies are also excluded.

and father confers this status upon his wife [36] and minor children "dwelling in the United States." [37]

235. **Modes of Expatriation.** — In spite of our championship of the doctrine of expatriation as a natural, inherent right, it was not until 1907 that the United States defined the conditions under which an American citizen should be deemed to have expatriated himself.[38]

The Law of 1907 provides:

(1) "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign State.

(2) "When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years.[39]

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[36] Provided she be a person who may be lawfully naturalized under our present laws, *i.e.* if she be a white person or of African descent.

Sec. 4 of the Act of 1907 provides that "any foreign woman who acquires American citizenship, by marriage to an American, shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such, before a United States consul within one year after the termination of such marital relation." Prior to the law of 1907, the status of an American woman married to an alien was doubtful. Van Dyne, 242 ff.

"Any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein." Sec. 3, Act. of 1907. For the interesting case of *Mrs. Heisinger*, see 3 Moore, § 413, pp. 467–469, and Van Dyne, 207–211.

[37] This includes those minor children born abroad who come to the United States after the father's naturalization, as well as those born abroad who reside in the United States at the time of naturalization. 3 Moore, § 413, and Van Dyne, ch. 2, pp. 197 ff.

[38] It had, however, frequently been held by the State Department (see especially 3 Moore, § 430) that children born abroad of an American father might, at the age of majority, surrender the nationality of their parents and accept that of the country of their birth and residence. This election need not be formal, but may be inferred from acts showing an intention to reside (*animo manendi*) permanently abroad.

[39] These provisions have been incorporated into many of the Naturalization Conventions to which the United States has been a party.

Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of the State may prescribe: And *provided also*, That no American citizen shall be allowed to expatriate himself when his country is at war." [40]

236. **Effect of Declaration of Intention.** — Though mere declaration of intention in no wise confers citizenship or ab-

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[40] Sec. 2 of the Act of 1907 in "Reference to the Expatriation of Citizens and their Protection Abroad." See Supplement to 1 *A. J.* (1907), 258-259; or Van Dyne, *Naturalization*, 438-440. For the Instructions to Diplomatic Officers and Consular Regulations referred to above, see Van Dyne, 475 ff.

"It will be observed that the Act declares that expatriation may be effected in four different ways, viz. by naturalization in a foreign State, by taking the oath of allegiance to a foreign State, by marriage of an American woman to a foreigner, and by residence of a naturalized citizen of the United States in a foreign country." Van Dyne, 337.

"While residence of a naturalized citizen of the United States in a foreign country is not sufficient evidence of expatriation, long-continued residence abroad raises a presumption of abandonment of citizenship. The presumption of law, with respect to residence in a foreign country, especially if it be protracted, is that the party is there '*animo manendi*,' and it lies upon him to explain it." Van Dyne, 345.

A person "may reside abroad for purposes of health, of education, of amusement, of business, for an indefinite period; he may acquire a commercial or a civil domicile there; but, if he does so sincerely and *bona fide animo revertendi*, and does nothing inconsistent with his preëxisting allegiance, he will not thereby have taken any step toward self-expatriation." Secretary Fish to the President (in 1873). Cited by Van Dyne, 345.

"Voluntary expatriation by a naturalized citizen which forfeits a right to diplomatic intervention may be inferred from a long residence abroad in the place of his birth, by the non-payment of taxes and non-possession of property in this country, and by failure to express an intention to return." 2 Wharton, *Digest*, § 176, pp. 368-369.

Another way (than the four modes above-mentioned) in which expatriation may be effected is by desertion from the army or navy. Contrary to the practice in some countries, foreign military or naval service or the acceptance of a public office in a foreign country do not in themselves effect expatriation in the view of the United States.

"The doctrine of implied renunciation of citizenship by continuous residence in a foreign country does not completely apply to countries where citizens of the United States enjoy exterritoriality. In such countries they live under the protection, more or less, of their own Government, and are answerable to its laws. Consequently, they are generally held to retain their American domicile." 3 Moore, *Digest*, p. 776. The presumption in favor of retention of nationality by missionaries in foreign lands is particularly strong.

On *Modes of Expatriation* or *Loss of American Nationality*, see especially 3 Moore, §§ 466-480; Van Dyne, *Citizenship*, Pt. IV, ch. 1; *Ibid.*, *Naturalization*, ch. 5; and 2 Wharton, *Digest*, §§ 176-179.

solves the party making it from allegiance to the Government of the country from which he comes,[41] yet our Secretary of State is authorized by Act of Congress to issue passports, at his discertion, to persons who are not fully naturalized in certain cases.[42]

III. Aliens, particularly Domiciled Aliens

237. **Domiciled Aliens.** — There is a third class of persons who, under certain circumstances, may be said to be clothed with the national character of the country in which they reside, but they are in no wise to be regarded as subjects or citizens. They are domiciled aliens.[43]

238. **What is Domicile?** — " By a person's domicile is meant, generally speaking, his permanent home [or residence]. It is the criterion, in English and American law, of civil as distinguished

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[41] See especially *Minneapolis* v. *Reum* (1893), 56 Fed. Rep. 576, and Scott, 390; 3 Moore, § 387; Van Dyne, *Citizenship*, Nos. 24, 26–38, 43; and *Ibid.*, *Naturalization*, 64–76, 224, 262–263.

[42] "Where any person has made a declaration of intention to become such a citizen as provided by law, and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, that such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention." Sec. 1 of Act of March 2, 1907, cited above.

In the famous *Koszta* case (see *infra*, p. 254 n.), Secretary Marcy did not, as frequently misrepresented, base his argument upon the fact that Koszta had declared his intention to be an American citizen, but he merely used this fact as evidence of domicile. The State Department has, in a few instances, held that such declaration gives a "quasi right to protection as against the claim of a third Power to allegiance." Secretary Frelinghuysen to Mr. Wallace, Minister to Turkey, 1884. See 3 Moore, p. 340. It is more than doubtful whether this can be maintained as a principle of International Law.

In the case of *Boyd* v. *Nebraska* (143 U. S. Rep. 178), the United States Supreme Court declared that minors acquire an inchoate status by declaration of intention on the part of their parents which entitles such minors, in case the naturalization of their parents remains incomplete, to retain American nationality at the age of majority or accept the allegiance of some foreign Power. See Van Dyne, *Citizenship*, Nos. 28 and 43.

In many States of the American Union, an alien who has declared his intention may vote at elections for Federal as well as State officers, but this does not make him a citizen of the United States.

[43] The laws of England still recognize a sort of inferior naturalization called denization. Denization is by letters patent issued under the Great Seal and deni-

from political status. The case is the same in the law of other countries, though not of all. In Italy, for example, civil status follows the political; and so it does to a great extent in France, and in the countries which, like Belgium, have followed the French Civil Code. It is not, however, conversely true that in countries where civil status is derived from domicile that political status follows the civil. In such countries, the two conceptions are distinct, neither being dependent upon the other."[44]

239. **Questions to which the Law of Domicile Applies.** — Thus, the question of domicile is quite distinct from that of allegiance or nationality proper. In most countries, the law of a man's domicile (*lex domicilii*) regulates such matters as legitimacy, minority, capacity to contract, marry,[45] or hold property, the validity of a will relating to personality, and the succession to personal property in cases of intestacy.

240. **The Principle of Nationality.** — Some countries, however, like France[46] and Italy, where the rules of the Civil Code are in

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zens appear to occupy an intermediate position between aliens and subjects. Under the old law, they could not inherit real property or transmit it to their children born before denization, but this distinction seems to have disappeared. Their main disqualification appears to be they are prohibited by the Act of Settlement (1700) from membership in the Privy Council or of either House of Parliament, from holding any office under the Crown, or from enjoying any grants of land from the Crown. The main advantage of this form of naturalization appears to be that it affords a means of avoiding the requirement of five years' residence in the United Kingdom required for ordinary naturalization. On *Denization*, see Hall, *Foreign Jurisdiction*, etc., § 22, and 1 Piggott, *Nationality*, ch. 6.

[44] 3 Moore, *Digest*, § 487, p. 811. Professor Moore adds: "In primitive times it was not so. In days when the people were generally attached to the soil, . . . domicile was the general criterion of status, political as well as civil, if, indeed, it can be said that such a distinction then existed. But, with the passing away of the feudal system and the rise of the modern national State, together with the coincident development of commerce and industry, political allegiance — allegiance to the nation — became, as a distinct conception, the test of national character, while domicile, whether national or quasi-national, or merely municipal, remained the test of rights in civil relations."

[45] This refers merely to capacity to contract a marriage, as the age of consent, etc. The effects of marriage itself appear, generally speaking, to be governed by the law of the place (*lex loci rei sitæ*) where the marriage has been celebrated.

[46] France applies the principle of nationality to marriages by Frenchmen abroad, Thus, a marriage contracted by a Frenchman in which the forms required by French law have not been observed, will not be regarded as valid by French tribunals. The marriage of Jerome Bonaparte in 1803 to Miss Patterson of Baltimore was invalidated on this ground. Dana, note 55 to Wheaton, § 93, p. 151.

force, apply the principle of nationality to many or all of these questions. Such matters really fall within the field of International Private Law or Conflict of Laws whose particular function it is to furnish the jurist with precedents, rules, and principles for the decision of cases arising under these heads. He has to determine, in any given case, whether to apply the law of domicile, the law of allegiance, or the simple rule of the *lex loci rei sitæ*.[47]

Although the law of domicile as a part of International Law is mainly confined to matters of prize or to cases arising from belligerent capture,[48] it may be of interest to indicate some of the more general rules of the *lex domicilii* in this connection because of their importance in international relations.

241. **Kinds of Domicile.** — According to most authorities, domicile is of two kinds — *Domicile of Origin* and *Domicile of*

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[47] The *lex loci* is especially applied to cases involving the conveyance of real property.

[48] See *infra*, § 442. In the famous *Koszta* case (1853), Secretary Marcy made the astonishing claim that "it is a maxim of International Law that domicile confers a national character," and that persons domiciled in the United States had a right to the protection of our Government while abroad.

Martin Koszta, a Hungarian refugee involved in the revolution of 1848, came to the United States, where he declared his intention of American citizenship on July 31, 1852. After a residence of nearly two years in the United States, he went to Turkey and placed himself under the protection of the American consul at Smyrna. Here he was seized and confined on board an Austrian brig of war, but was rescued by the prompt intervention of Captain Ingrahm, in command of the United States sloop of war *St. Louis*, who threatened to use force in case Koszta was not released. Fortunately, an arrangement was made by which the prisoner was delivered into the custody of the French Consul-General until the United States and Austria should agree as to the manner of disposing of him. Subsequently, he was sent back to the United States.

In the controversy which followed, Secretary Marcy supported the action of the United States mainly on two grounds: (1) That Koszta, having acquired a domicile in this country, was entitled to national protection. This argument was clearly untenable, as mere domicile only confers national (enemy) character under certain circumstances in time of war (see *infra*, § 442). (2) "By the laws of Turkey and other eastern nations, the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a large number of such *protégés*. International Law recognizes and sanctions the rights acquired by this connection." This position was clearly tenable, and furnishes ample justification for the action of our Government.

Chocie.[49] *Domicile of Origin* is that derived from the place of birth. Legitimate children acquire the domicile of the father and illegitimate children that of the mother at the time of birth. Foundlings have the domicile of the country in which they are born. *Domicile of Choice* is that deliberately adopted by a person of full age. It consists of a combination of actual residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*). The domicile of origin is retained until a domicile of choice is actually acquired; a domicile of choice until it is abandoned, when the domicile of origin reverts or a new domicile of choice is acquired.

242. **Special Rules of Domicile.** — The wife usually takes the domicile of her husband and retains it after his death. But if she should marry again, she acquires the domicile of her second husband. A legitimate minor has the domicile of his father or of his mother during widowhood, or, perhaps, in some cases, of his legally appointed guardian. In no case can the minor change his domicile of his own accord.

243. **Time and Intention the Controlling Principles Determining Domicile.** — The two controlling principles in determining domicile are *intention* and *time.* But mere intention, without some overt act, is not sufficient.[50] The most material circumstance showing intention is actual residence, but it may also be deduced from the nature of the occupation, correspondence, or business relations of the one claiming a domicile. Thus,

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On the *Koszta* case, see 3 Moore, *Digest*, §§ 490–491. The accounts of this case usually found in the treatises and textbooks are either inadequate or practically worthless, owing to the fact that they are, for the most part, based upon misconceptions or misrepresentations. For abridged citations from the documents, see 2 Wharton, *Digest*, §§ 175, 198.

In a subsequent case (that of *Simon Tousig*), an Austrian who had acquired a domicile in the United States and was later arrested and imprisoned in Austria, Secretary Marcy properly refused to intervene on the ground that Tousig had "voluntarily returned to Austria and placed himself within the reach of her municipal laws." 3 Moore, p. 838.

[49] Some authorities speak of a third kind — Domicile by Operation of Law, as where a minor or dependent person passes under the control of a legal superior or a person acquires a domicile by virtue of employment by the State. But it would seem that persons falling under this category may be readily classified under one or the other of the heads indicated in the text.

[50] Sir Wm. Scott, in *The President*, 5 Rob. 279. But a few days' residence was held sufficient in the case of *Mr. Whitehall*, who was shown to have intended to take

the pursuit of a regular trade or business would clearly indicate domicile or permanent residence. The presumptions, in these cases, would be strongly in favor of intention (*animo manendi*); but this presumption may be overcome by proof that the original intention was only to remain for a short and definite time, and that the original domicile has not been lost or a new domicile acquired.

Domicile of origin easily reverts in cases of acquired domicile. To effect this it is sufficient that the person with a domicile of choice should actually begin his return journey to his native country with the intention of resuming his residence there.[51]

244. **The Right of Excluding Aliens.** — "Every State is free to admit foreigners upon its territory or to exclude them, in case of necessity, from motives of public order; with stronger reason it is free to admit them on certain conditions, under certain restrictions. At the same time the usage generally followed by governments permits to foreigners, in times of peace, entrance upon their territory, freedom to trade, passage, temporary sojourn, and settlement; but it is well understood that every individual presenting himself upon foreign territory, by this fact alone tacitly agrees to submit to the laws of the country that receives him, to pay the imposts due from any commercial

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up his permanent residence in the island of St. Eustatius shortly before the British took it from the Dutch in 1781. Lawrence (3d ed.), p. 320; and Wheaton, § 321.

The importance of time or long-continued residence was carefully considered by Sir Wm. Scott in the case of *The Harmony* (1800), 2 C. Rob. 322 and Scott, 585. Lord Stowell held that "a special purpose may lead a man to a country which shall detain him the whole of his life . . . against such a long residence, the plea of an original purpose could not be avowed. It cannot happen, with but few exceptions, that mere length of time shall not constitute a domicile."

The presumption against an acquired domicile would be strong in the case of a mere student, a prisoner, or a missionary.

[51] Thus, in the case of *The Indian Chief* (1801), 3 C. Rob. 12, and Scott, 588, Lord Stowell ordered the restoration of the property of Mr. Johnson, an American domiciled in England, on proof that, at the time of capture, he had actually left England for the United States with the intention of remaining there. Lord Stowell said: "The character that is gained by residence ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*."

The leading American case is that of *The Venus* (1814), 8 Cranch, 253, and Scott, 591. It adopts the principles of the British decisions, cited above, and in connection with these, should be carefully considered by the student. For a good commentary, see Hall (5th ed.), 497–500; Lawrence (3d ed.), § 177; and Wheaton, §§ 322–33e.

operations in which he may engage or any business which he may establish, and to observe the local police regulations."[52]

245. **The Practice of the United States.** — The United States has exercised the power of total exclusion in the case of the Chinese[53] (and this in violation of treaty), and Congressional legislation to this effect has been upheld by our Supreme Court.

"It is an accepted maxim of International Law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national Government, to which the Congress has committed the entire control of international relations, in peace as well as in war. It belongs to the political power of the Government, and may be exercised either though treaties made by the President and Senate, or through statutes enacted by Congress."[54]

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[52] 2 Calvo, § 700. Those authorities like Bonfils, Fiore, Heffter, etc., who claim that the Law of Nations guarantees certain natural rights to the individual, speak of a *right* of emigration as "flowing logically from the principle of individual liberty." But these same publicists admit that some States discourage emigration and that "the freedom of emigration does not imply the absolute right of *immigration*." Bonfils, Nos. 412–414.

It is true that nearly all modern States, with the exception of Russia, freely permit emigration, but this is not legally obligatory upon the State.

Some publicists (*e.g.* Liszt, 3d ed., § 25) maintain that, as a result of the fundamental right of commerce or intercourse between States, a member of the family of nations is under obligation to open its territory to the nationals of all civilized States.

True it is that a modern State which excluded all foreigners would practically place itself outside the pale of the international community, and that the exclusion of those of a particular nationality would probably justify measures of retorsion (a form of reprisal — see *infra*, § 321); but there can be no legal obligation in the premises. "The reception of foreigners is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude foreigners from the whole or any part of its territory." 1 Oppenheim, § 314.

Rivier (I, p. 307) states the correct doctrine when he says: "The State is master in its own house. It may refuse to foreigners access to its territory, interdict all immigration, or the immigration of certain individuals or of certain categories of individuals, for example, nationals of certain countries." Rivier adds, however, that this principle, which flows logically from the rights of independence and self-preservation, is to-day greatly tempered by the rights of mutual commerce and inoffensive passage.

For resolutions on the admission of foreigners adopted in 1892 by the Institute of International Law, see 12 *Annuaire*, 220–221. See especially Art. 6. For 10 Articles and 14 wishes on the subject of emigration, see 16 *Annuaire* (1897), 262–264 and 276–279.

[53] For the legislation and treaties relating to the Chinese, see 4 Moore, *Digest*, §§ 567–578. For 52 rules regulating the admission of the Chinese in 1909, see

246. **The Immigration Laws of the United States.** — Since 1875 the Congress of the United States has shown ever increasing severity in its general restrictions upon foreign immigration. The Act of March 2, 1907,[55] levies, for purposes of an "immigrant fund," a head tax of four dollars for every alien entering the country and provides that "the following classes of aliens shall be excluded from admission into the United States:

"All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of

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Treaty, Laws, and Regulations Governing the Admission of the Chinese, published by the Bureau of Immigration and Naturalization of the Dept. of Commerce and Labor (1909), 34 ff. For a selected bibliography on the Chinese Question, see Mrs. Coolidge, *Chinese Immigration* (1909), 505 ff. For more complete bibliographies, see Cowan and Dunlap, *Bibliography of the Chinese Question in the United States* (1909); Griffen, *Select List of References on Chinese Immigration* (1904); and *Ibid., A List of Books on Immigration* (1907).

As a result of agitation for an anti-Japanese exclusion law, a *modus vivendi* between the Japanese and the United States Governments was effected in 1907 whereby the Japanese were practically excluded by executive action in the two countries.

[54] Justice Gray, in *Nishimura Ekiu* v. *United States* (1891), 142 U. S. 651, 659. *Cf.* Justice Field in *Chae Chan Ping* v. *U.S.*, 130 U. S. 581, 609; and Justice Gray in the *Chinese Cases* (1892), 149 U. S. 698, and Scott, 382.

[55] For previous legislation, see 4 Moore, *Digest*, § 562.

The Act of 1875 merely prohibited the importation of women for purposes of prostitution and the immigration of aliens "who are undergoing conviction in their own country for felonious crimes, other than political. . . ." The Act of 1882 levied a head tax of fifty cents "for every passenger not a citizen of the United States," and forbade the landing of convicts, lunatics, idiots, or of "any person unable to take care of himself or herself without becoming a public charge." The Act of 1885 forbade the immigration of aliens under contract to labor. The Acts of 1891 and 1903 made a number of further additions to the excluded classes (such as anarchists, polygamists, and epileptics), the latter Act raising the head tax to two dollars; but it was not before 1907 that this tax was raised to four dollars, and imbeciles, the feeble-minded, persons afflicted with tuberculosis, those physically defective, etc., were excluded. A highly desirable illiteracy test was favored by the Senate, but unfortunately stricken out by House of Representatives.

In 1905 the British Parliament passed an Aliens Act largely modeled on the Act of Congress of 1882. It merely excludes undesirable aliens who belong to one or more of the following classes:

"(*a*) If he cannot show that he has in his possession or is in a position to obtain the means of decently supporting himself and his dependants (if any).

insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous or contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution, or for any other immoral purpose, or persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers,[56] who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; those who have been, within one year from the date of application for admission to the United States, deported as having been induced

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"(*b*) If he is a lunatic or an idiot, or owing to any disease or infirmity appears likely to become a charge upon the rates or otherwise a detriment to the public.

"(*c*) If he has been sentenced in a foreign country with which there is an extradition treaty for a crime, not being an offense of a political character, which is, as respects that country, an extradition crime within the meaning of the extradition Act, 1870.

"(*d*) If an expulsion order under this Act has been made in his case."

But, unlike the legislation of the United States, the Act provides for exemption in case of an immigrant who proves that he is seeking admission solely to avoid religious persecution. The Act also provides specific directions for the expulsion of undesirable aliens.

For an analysis of the Aliens Act of 1905, see Sibley and Elias, *The Aliens Act and Right of Asylum* (1906), 43 ff. For the text, see *Ibid.*, App. I, 83 ff.

Immigration laws exist in a number of countries, but the power of *expulsion* is much more general than that of prohibitions against admission. Sibley and Elias, 19.

[56] For judicial interpretations of the term "contract laborers," see 4 Moore, § 564.

or solicited to migrate as above described; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively shown that such person does not belong to one of the foregoing excluded classes and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly; all children under sixteen years of age, unaccompanied by one or both of their parents, at the discretion of the Secretary of Commerce and Labor, or under such regulations as he may from time to time prescribe: *Provided*, That nothing in this Act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude: *Provided further*, That the provisions of this section relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory; *And provided further*, That skilled labor may be imported if labor of like kind unemployed cannot be found in this country; *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants." [57]

It may thus be seen that the main purpose of the Immigration Law of the United States is to exclude those aliens who are regarded as mentally, morally, or physically undesirable, and that the object of the law is self-protection.

247. **Expulsion of Aliens.** — The right of expelling foreigners is also generally held to be an attribute or incident of sovereignty,[58] and is probably practiced, to a greater or less extent, by all political communities. It is usually justified on grounds of self-protection or public interest. Expulsion is necessarily an admin-

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[57] Sec. 2 of the Act of Feb. 20, 1907, as printed in Supplement to 1 *A. J.* (1907) 239–241. For comments, see editorial in 1 *A. J.*, 452–462.

[58] A few publicists like Fiore (*Droit Penal Int.*, 100 ff.) and Pinheiro-Ferreira (*Notes sur Vattel*, liv. II, c. 8, § 100) are of the opinion that the practice of expulsion is an invasion of natural rights; but the majority of the authorities justify

istrative act, but it is not a punitive measure and should not be performed in an arbitrary or needlessly injurious manner or for insufficient cause. The expelled person has a right to know the reason for his expulsion, and this reason should be communicated to the Government of the State to which he belongs. Unless there is imperative reason for urgency, he should be given a reasonable time to adjust his affairs, more especially in the case of a domiciled alien with business or property interests.[59] There should be no discrimination because of race or religion.[60]

If these rules are violated, an indemnity [61] may be demanded by the Government of the injured alien. If this be refused, the case should be arbitrated. As a last resort, recourse may be had to reprisal in the form of retorsion.

248. **Rights of Aliens.** — Nearly all modern nations place the foreigner upon substantially the same footing as the native in respect to the enjoyment of civil as distinguished from political rights. In a few States they are still under certain disabilities as far as trade, the practice of certain occupations and professions, religious worship, and the ownership, transfer, and inheritance of real property are concerned.[62]

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it on grounds of public interest. See, *e.g.* *Bluntschli, Art. 383; Bonfils, No. 442 (see especially p. 255 of 5th ed. for references); Bès de Berc, *De l'expulsion des étrangers* (1888); *6 Calvo, §§ 119–125; Darut, *De l'expulsion*, etc. (1902); Despagnet, Nos. 347–348; Duplessix, Nos. 138–143; * Martini, *L'expulsion des étrangers* (1909), ch. 1; *4 Moore, *Digest*, §§ 550–559; *1 Oppenheim, §§ 323–326; 3 P.-Fodéré, Nos. 1857 ff.; *1 Rivier, 311–314; Rolin-Jaequemyns, in 20 *R. D. I.* (1888), 498; 2 Wharton, *Digest*, § 206.

In *Turner* v. *Williams* (1904), 194 U. S. Rep. 279, the Supreme Court of the United States declared the right to expel aliens inherent in sovereignty. For the resolutions on expulsion of foreigners adopted by the Institute of International Law, see 12 *Annuaire* (1892), 221–226, Arts. 14–41.

[59] For cases of expulsion, see 3 and 4 Moore, *Digest*, §§ 393, 399, 463, 550–559. See especially the case of *Hollander*, in 4 Moore, pp. 102–108.

[60] Such discrimination is practiced by Russia in the case of Jews. See 4 Moore, § 554.

[61] The British exacted an indemnity from Nicaraugua for the arbitrary seizure and expulsion of twelve British subjects in 1894. See the *Bluefields* case, in 4 Moore, *Digest*, § 551, pp. 99–102.

For claims on account of expulsion, decided by mixed commissions, see 4 Moore, *Int. Arbitrations*, 3333–3359.

[62] Trade restrictions are still very great in China. It is generally known that foreigners are only legally permitted to trade in certain ports or places opened by treaty.

In Japan property in the soil (if not in immovables in general) is still forbidden

All that aliens can claim, however, from the strictly legal standpoint, is protection of life and property, and access to the courts for the sake of securing this protection.[63] But most modern States permit to alien friends the free use of their courts on the same terms as natives or citizens. The United States even recognizes the right of non-resident aliens to sue in the Federal courts.[64]

249. **Duties of Aliens.** — In return for this protection, mere passing travelers or visitors, as well as resident aliens, owe a local and temporary allegiance and obedience to the laws or the sovereign in whose country they live or through whose territory they pass. They are subject to the local administration and may be punished for any crimes or misdemeanors committed within the jurisdiction of such sovereign.[65] They must obey all reasonable regulations instituted for their welfare or for the convenience of

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to foreigners as individuals. It also appears that the personality of foreign corporations is not recognized in Japan. At least this was the case in 1903. See Clavery, *Les ètrangers au Japon* (1904), vi and 5. The Jews are still under certain religious and economic disabilities in Russia and Roumania.

In several States of the American Union, aliens are still prohibited from purchasing, holding, or inheriting real estate; but these disqualifications have, in the case of those belonging to certain nationalities, been overridden by treaties which our courts hold to be the law of the land, State laws or constitutions to the contrary notwithstanding. See 4 Moore, *Digest*, §§ 544–545.

The British Act of Naturalization of 1870 removed the disabilities until then resting upon aliens in the United Kingdom in respect to the acquisition and disposition of real property. The registry laws of the United States, as in some other countries, place certain restrictions upon aliens in respect to the registration of vessels. 2 Moore, *Digest*, § 322.

The special rights of exterritoriality still enjoyed by foreigners in some Eastern countries will be briefly considered under the head of Consular Jurisdiction. See *infra*, 291.

[63] For a fuller discussion of this subject, see *supra*, ch. 10.

[64] France refuses the use of her tribunals where the plaintiff and defendant are both foreigners. This system is justly condemned by Bonfils, No. 447.

[65] Aliens traveling or residing in foreign lands are none the less subject to the laws of their own country. They are thus subject to a double or concurrent jurisdiction. But it is not customary for the home State to assert jurisdiction over crimes committed by its citizens abroad except for particular offences (such as treason, counterfeiting, etc.) or in particular places (in barbarous countries or communities).

Aliens traveling or residing abroad are subject to recall (*jus avocandi*) for military service. Their government owes them a certain measure of protection against arbitrary or oppressive acts on the part of foreign governments, but this protection is exercised at the discretion of the home government. See *supra*, ch. 10 and Bibliography on pp. 169–170.

the local authorities, such as requirements in respect to the *visé* of passports,[66] registration, etc.

The power to impose taxes being an attribute of sovereignty, aliens must pay all just and ordinary taxes, but they are not bound to submit to the exaction of forced loans[67] or to taxes which are discriminatory and confiscatory. Resident aliens, who have not declared their intention to become naturalized citizens or who have not exercised the right of suffrage are not liable to military service, though it is generally held that they may be called upon to perform police or militia service in case of necessity.[68]

IV. EXTRADITION OF FUGITIVE CRIMINALS AND POLITICAL OFFENDERS

A fourth category of individuals who may, from a certain point of view, be regarded as objects of the Law of Nations, are Fugitive Criminals and Political Offenders.

250. **Fugitive Criminals.** — Fugitive criminals or persons accused of crime committed in one country and fleeing into another may be extradited or delivered by the government of the latter into the hands of the authorities of the former, upon the demand of the government of the nation in whose territory the crime has been committed. In the absence of a treaty, extradition is not, strictly speaking, a legal obligation;[69] for there is no

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Some countries even wrongfully assert jurisdiction over foreigners for acts committed on foreign territory. See *supra*, § 149 and p. 160 for references on the *Cutting Case.*

[66] On *American Passports*, see especially 3 Moore, *Digest*, §§ 493–533, and Gaillard Hunt, *The American Passport.* Though often found to be a convenience, they are no longer a necessity in western Europe, *i.e.* outside of Russia. It should be noted that, according to the Expatriation Law of 1907, limited passports may now be issued to those who have merely declared their intention.

[67] 2, 4, and 6 Moore, *Digest*, §§ 183–184, 540, and 1036. For the consideration of the subject of forced loans by international commissions, see 4 Moore, *Int. Arbitrations*, ch. 62, 3409–3411.

[68] On the *Exemption of Aliens from Ordinary Military Service*, see especially Bluntschli, Art. 391; Bonfils, No. 445; Despagnet, No. 354; * Hall (5th ed.), 207–209; * 1 Halleck (Baker's 3d ed.), 419–420 n., 558–559 n.; Lawrence, *Principles* (3d ed.), § 117: * 4 Moore, *Digest*, § 548; 1 Westlake, 211–212; 2 Wharton, *Digest*, § 202.

[69] Clarke (*Extradition*, ch. 1, 4th ed., 1903) vainly attempts to show that the assertion that "the majority of jurists deny the existence of any right to demand

generally recognized rule of International Law which requires that the worst criminal be given up by one sovereign upon the request of another.

But it is to the interest of civilization and the international community that all persons guilty of serious crimes be extradited for trial to the place where the crime has been committed. Since the third decade of the nineteenth century[70] a number of laws have been enacted and numerous treaties of extradition concluded which prescribe the mode and conditions of delivery and enumerate crimes for which extradition shall take place.

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extradition" is incorrect. He quotes from Grotius, Pufendorf, Kent Story, etc.; but he is not fully borne out even by these authorities, for the majority of them evidently consider extradition a natural right or moral duty rather than a legal right or obligation. He himself finally concludes (p. 14) that the refusal to surrender fugitive criminals is "a serious violation of the moral obligations which exist between civilized communities."

The great majority of the more modern authorities clearly regard extradition, in the absence of a treaty, as a mere matter of comity, discretion, interest, or moral obligation. This is also the view of the great majority of jurists and statesmen, and it is borne out by international practice. See especially 4 Moore, *Digest*, §§ 580 ff.; and Spear, *The Law of Extradition* (1885, 2d ed.), ch. 1, for views of American jurists and statesmen.

Some modern authorities are, however, not quite clear upon this point. Fiore (I, Nos. 626–627) considers extradition a duty of mutual aid or assistance. Despagnet (No. 291) speaks of it as a "theoretical obligation founded upon the principles of International Law," but denies that it is a "positive obligation," in the absence of convention. Westlake (I, p. 244) classes it as an "imperfect right." Rivier (I, p. 348) appears to be practically alone in holding, apparently without reserve, that "independently of all conventional arrangement, there is an obligation of extradition existing between States of equal civilization, members of the international community." But even he adds: "This principle is to-day more or less generally recognized, at least in theory."

[70] Treaties of extradition were comparatively infrequent prior to the French Revolution. Contrary to the modern usage, they were usually directed against political offenders rather than ordinary criminals. Art. 20 of the Treaty of Amiens (1802) provided for the reciprocal extradition of fugitives accused of certain heinous crimes between England, France, Spain, and the Batavian Republic. But it was not until after 1840 that Treaties of Extradition may be said to have become frequent. This was doubtless owing to increased facilities of interstate communication.

The first municipal law on the subject appears to have been the Belgian law of 1833, but it was not until 1870 that the British Parliament passed an Extradition Act. The Congress of the United States passed General Extradition Laws in 1848 and 1869 — Acts which are now replaced by sections 5270–5277 of the Revised Statutes, supplemented by the Act of 1882 (22 U. S. Stat. at Large, 215).

With the exception of Art. 27 of Jay's Treaty of 1794 with Great Britain (which

251. **The Nature of Extradition.** — As a rule, States refuse to extradite their own citizens or subjects.[71] Just as a government, unless bound by treaty, may refuse extradition for any crime whatsoever, so it may grant extradition at its discretion, unless restrained by municipal law.[72] For extradition is essentially a political or executive act, though the judiciary usually

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expired by limitation in 1807), the first treaties of the United States were with Great Britain in 1842 and France in 1843.

For the Extradition Treaties and Laws of the United States, see Hawley, *Int. Extradition* (1893); Moore, *Extradition* (1891); Spear, *The Law of Extradition* (1885), *Appendices; Supplements to A. J.*

For the Laws and Treaties of Great Britain, see Biron and Chalmers, *Extradition* (1903); Clark, *Extradition* (1903), *Appendix;* and Piggott, *Extradition* (1910), *Appendix II*, pp. 25 ff.

[71] England and the United States are exceptions to this rule. This arises from the fact that the United States does not, except for such international crimes as piracy and the slave trade, punish her citizens for crimes committed out of the country, and that England only punishes her subjects for such crimes as treason, murder, bigamy, etc., when these are committed abroad.

In the absence of a clause expressly exempting nationals from extradition, the State Department at Washington holds that they should be surrendered upon demand. Italy, however, has refused to deliver up her subjects to the United States in spite of the fact that the Extradition Treaty between the two countries contains no such exemption. See 4 Moore, *Digest*, § 594, pp. 290 ff. In 1890 the Swiss Federal Tribunal decided in favor of the position taken by the United States. *Ibid.*, pp. 298 ff.

In *Trimbles Case* (1884) the United States declined to order the surrender of one of its citizens to the Mexican Government "on the ground that, as the treaty negatived any obligation to do so, the President was not invested with legal authority to act." 1 Moore, *Extradition*, 166.

Art. 6 of the Treaty of 1861 with Mexico declared that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty." Secretary Frelinghuysen construed this provision (which, as he said, was identical with clauses in fourteen other Extradition Treaties of the United States) as conferring upon the President no discretionary power whatever — a view which was judicially upheld in *Ex parte McCabe*, 46 Fed. Rep. 363. Art. 4 of the Treaty of 1899 between the United States and Mexico expressly granted such discretionary power to the President. 4 Moore, *Digest*, p. 303.

"In July, 1895, the Mexican Government declined to surrender to the United States Chester W. Rowe, a fugitive from justice, on the ground that he had, by the purchase of real estate in Mexico, assumed Mexican nationality." *Ibid*, p. 302.

[72] This at least appears to be the prevailing doctrine in France and on the Continent. But it is not the view in England or the United States. In the United States, it has been almost uniformly held that, in the absence of a treaty, the President is not authorized to order an extradition. An exception was the unauthorized surrender by Secretary Seward of *Arguelles* to Spain in 1864. But this violation of constitutional law and custom has been generally condemned. On the *Arguelles* case, see Clarke, 72–74; Lawrence (3d ed.), § 132; * 1 Moore,

decides the legal or technical points involved, at least in England and the United States. Extradition is generally granted on the bases of reciprocity, and is applied to a considerable number and variety of crimes.[73]

252. **Rules of Extradition.** — There are several conventional rules governing extradition which are so generally observed that they may be claimed as virtual rules of International Law. One of these is that the names of the crimes enumerated in Extradition Treaties should be construed in accordance with the law which prevails in the State which asks for the surrender of the fugitive criminal. In other words, the name of the crime is to be determined rather by the law which has been violated than by the law of the county in which the fugitive is found. Thus, our Supreme Court held that the Spanish word *falsificacion* used as a corresponding word for *forgery* in the Mexican text of the Treaty of 1861 was equivalent to a charge of forgery, even though the crime committed (that of forgery of theatre tickets) might

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Extradition, § 27, pp. 33 ff.; 4 *Ibid., Digest*, § 581, pp. 249 ff.; Spear, *Extradition*, 1–3, 6, 43; Dana's Wheaton, § 115, note 73; Woolsey, § 78.

In England it is held that the common law gives the Government no right to surrender an alien. The Crown may negotiate extradition treaties, but they are given effect by Orders in Council under the authority of an Act of Parliament. See Clarke, *Extradition*, ch. 5.

[73] The Extradition Act of Great Britain (1870) specified the following crimes as extraditable: murder, and attempt and conspiracy to murder; manslaughter; counterfeiting and altering money and uttering counterfeit or altered money; forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered; embezzlement and larceny; obtaining goods or money by false pretences; crimes by bankrupts against bankruptcy law; fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats by letter or otherwise with intent to extort; piracy by law of nations; sinking or destroying a vessel at sea, or attempting or conspiring to do so; assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

To this list the Extradition and Slave Trade Acts of 1873 added the following; kidnapping and false imprisonment; perjury, and subornation of perjury; and slave trading. See Biron and Chalmers, 78–79, 88. For commentary on Extradition Act of 1870, see Piggott, *Extradition* (1910), ch. 3.

Art. 27 of the Jay Treaty of 1794 with Great Britain merely provided for extradition in case of murder or forgery. The Treaty of 1842 enumerated seven extraditable crimes; the Convention of 1890 with Great Britain adds twenty more.

not be forgery at common law — a point which was left undetermined.[74]

Another rule now fully established is that a criminal cannot be tried for any other crime than that named in the warrant of extradition.[75]

It is also customary, at least in England and the United States, before a warrant of extradition is issued, to require such evidence of guilt as, according to the laws of the country where the fugitive is found, would justify his (or her) commitment for trial if the crime had been there committed. But this can hardly be considered a principle of International Law, for a State has discretionary power in this matter. In England and the United States aliens have the privilege of habeas corpus.

253. **Political Offenders.** — There is one class of offenses which are not extraditable, according to modern usage. It is now universally held that political offenders are exempt from ex-

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[74] *Benson* v. *McMahon* (1888), 127 U. S. Rep. 457, 466. *Cf. In re Farez*, 7 Blatch. 345. On these two cases, see Hawley, *Int. Extradition*, 5–7; and 4 Moore, *Digest*, pp. 276–278.

[75] See especially *United States* v. *Rauscher* (1886) 199 U. S., 407, and Scott, 274. Prior to this important decision, judicial opinion in the United States had been divided. For the cases, see Snow's note in Scott, 282, or Snow, *Cases*, 158.

During the famous *Winslow* controversy between the United States and Great Britain (1876), Secretary Fish contended that a person could be indicted and tried for an offense other than that for which he had been extradited. Lord Derby, on the other hand, claimed that it was "an essential principle of extradition" that a person surrendered for one offense should not be tried for another.

Before the requisition for Winslow's extradition had been presented at London, the British Minister at Washington suggested that it would probably be refused unless the United States entered into a stipulation that Winslow would not be tried for any other offense than that for which he was to be surrendered. As a consequence of this difference, the execution of the treaty of 1842 was suspended until the British Government temporarily receded from its position.

On the *Winslow Case*, see especially Hawley, *Extradition*, 8–13; * 1 Moore, *Extradition*, 196–219; 4 *Ibid.*, *Digest*, § 456; * 2 Wharton, *Digest*, § 270. For further references on this case and an excellent summary of the judicial history of this subject in the United States, see 4 Moore, *Digest*, pp. 308–111.

The rule is different in "Inter-State Rendition" or the Law of Extradition between States of the American Union. In the States persons can be tried for crimes other than those for which they have been extradited. It has even been held that persons kidnapped in one State and carried forcibly into another may be tried. The State Courts merely assert jurisdiction; they will not inquire into irregularities of this kind. For citation of numerous cases, see *State* v. *Patterson* (1893), 116 Missouri, 505, and Scott, 283. On "Interstate Extradition," see especially 1 Willoughby, *The Const. Law of the U. S.* (1910), ch. 14.

tradition process.[77] But there is unfortunately no agreement as to the nature or content of a political offense, and no satisfactory definition of a political crime has as yet been evolved.

254. **Difficulties of Definition and Application.** — The difficulties of definition[78] and its application arise from two sets of facts.

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[77] This exemption holds, whether expressed in treaties or not.

The recognition of the non-extradition of political offenders as a general principle of conduct dates from the European Revolutions of 1830 and 1848, though it may be said to owe its origin to the French Revolution of 1789. It was particularly England, Switzerland, France, Belgium, and the United States who championed the cause of political freedom. In 1830 even Austria and Prussia refused Russia's demand for the extradition of Polish refugees. But a reaction set in (1833) when Austria, Prussia, and Russia concluded agreements stipulating that persons who had committed high treason and *lèse majesté*, or who were guilty of conspiracy or revolt against a throne or legitimate government should be surrendered. The same year (1833) Belgium passed her famous Extradition Law (see *supra*, p. 264) which expressly forbade the extradition of political offenders — a provision which finds its first incorporation in a modern treaty in the Convention of 1834 between Belgium and France. Since 1866 even Russia has felt herself obliged to agree to the non-extradition of political offenders. Grivaz, *Nature et effects du principe de l'asile politique*, ch. 2; and Martitz, *Internationale Rechtshilfe in Strafsachen*, 134-184. For a good summary, see 1 Oppenheim, § 133.

[78] For various definitions of a political offence, see 2 Calvo, § 1034; and 3 P.-Fodéré, No. 1872. One of the best characterizations is that by Lord Denman in the *Castioni* case (1908), 1 Q. B. Div. 149, and Scott, 285:

"The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."

This is the solution adopted by the Swiss Extradition Law of 1892. "Art. 10 recognizes the non-extradition of political criminals, but lays down the rule at the same time that political criminals shall nevertheless be surrendered in case the chief feature of the offense wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the *Bundesgericht*, the highest Swiss Court of Justice." 1 Oppenheim, § 337.

Arts. 13, 14, and 15 of the Oxford Rules adopted by the Institute of International Law as modified at Geneva in 1892 declare:

"Art. 13. Extradition is inadmissible for purely political crimes or offenses.

"Nor can it be admitted for unlawful acts of a mixed character or connected with political crimes or offenses, also called relative political offenses, unless in the case of crimes of great gravity from the point of view of morality and of the common law, such as murder, manslaughter, poisoning, mutilation, grave wounds inflicted wilfully with premeditation, attempts at crimes of that kind, outrages to property by arson, explosion or flooding, and grave robbery, especially when committed with arms and violence.

"So far as concerns acts committed in the course of an insurrection or of a civil war by one of the parties engaged in the struggle and in the interest of its

In the first place, a crime may be purely political or it may have a double motive or end — it may be partly political and partly personal or private. Such crimes have been named *délits connexes* (mixed) by French publicists. In the next place, a crime may be political in appearance, but really private or *vice versa*.

In the latter case, no serious difficulty presents itself, provided the facts are clearly established. For the determination of these facts, a judicial inquiry would seem to be desirable. A more serious difficulty arises in the case of mixed crimes. Here it may be extremely difficult or well-nigh impossible to determine the dominant or controlling motive or purpose, as where theft, arson, or homicide, have been committed. In these cases, too, a judicial decision based on a thorough investigation would seem to be the best solution.

Then, too, a political crime may be of such a gross and outrageous character, as in the case of the assassination of a constitutional sovereign or chief of State, that it is not to the interest of other States to refuse extradition. Such cases should be exempted from the operation of the rule that political offenders are not extraditable.[79]

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cause, they cannot give occasion to extradition unless they are acts of odious barbarism or vandalism forbidden by the laws of war, and then only when the civil war is at an end.

"Art. 14. Criminal acts directed against the bases of all social organization, and not only against a certain State or form of government, are not considered political offenses in the application of the foregoing rules.

"Art. 15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the demanding State gives the assurance that the person surrendered shall not be tried by extraordinary courts." As translated by 1 Westlake, 246-247. For the French text see 12 *Annuaire*, 182, and *Tableau*, 101–102.

These rules have been criticised, but they seem to embody the best opinion on this subject.

[79] See Arts. 13 and 14 cited above. There is still considerable difference of opinion respecting anarchistic and nihilistic attempts and attacks upon the life of a reigning sovereign or Chief of State. Many States have accepted the so-called *attentat* clause enacted by Belgium in 1856. This clause stipulated that the murder of the head of a foreign government or of a member of his family should not be considered a political crime. 1 Oppenheim, § 335. The United States has even included it in a few of its Extradition Treaties. For clauses dealing with political offenses in Extradition Treaties between the United States and other countries, see Supplement to 3 *A. J.* (1909), 144 ff.

As Oppenheim (I, § 339) justly observes: "The Belgian clause goes too far, since exceptional cases of murder of heads of States from political motives or for political

V. The Right of Asylum

255. **The So-called Right of Asylum.** — This so-called right applies especially to criminals, political refugees, and slaves, and has been claimed on warships, in legations, and even on merchantmen in the case of political refugees, who, having escaped to another country, take passage on a foreign merchant vessel for a third country, said vessel being bound on a voyage which includes calls at ports of their own country.[80]

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purposes might occur which do not deserve extradition." There have been attempts of this nature which were either legitimate as part of a political insurrection or which, because of the tyranny and oppression exercised, are not condemned by the moral sense of mankind.

On the other hand, mere anarchistic attempts should receive no quarter. Socialists, however, stand upon an entirely different footing, for their efforts are not "directed against the bases of all social organization"; they aim at the reorganization of society on a juster and sounder foundation.

It should be added that press offenses are usually regarded as political.

On *Political Offenses*, see especially Bluntschli, Art. 396; * Bonfils, Nos. 466–472; Bry, No. 329; 2 Calvo, §§ 1034–1045; 1 Cobbett's *Cases* (3d ed.), 238–239, 240–241; Despagnet, No. 304 B.; Diena, in 2 *R. D. I. P.* (1895), 306 ff.; * Grivaz, *Nature et effets du principe de l'asile politique* (1895); Lawrence, *Principles* (3d ed.), § 133; *Ibid.* (4th ed.), § 111, pp. 262 ff.; Liszt (3d ed.), § 32; Lamasch, in 3 Holtzendorff, 485 ff.; *Ibid.*, *Auslieferungspflicht und Asylrecht* (1897); * 2 Mérignhac, *Traité*, 754–777; * 4 Moore, *Digest*, § 604; * *Ibid.*, *Extradition*, 303–326; 3 F. de Martens, § 96; * Martitz, *Internationale Rechtshilfe in Strafssachen* (1888–1897); * 1 Oppenheim, §§ 333–340; * 3 P.-Fodéré, Nos. 1871–1873; Renault, in 7 *J. I. P.*, 65 ff.; 1 Rivier, 351–357; Rolin, in 12 *Annuaire*, 156 ff.; *Ibid.*, 24 and 26 *R. D. I.*, 285–293 and 125–152; * Scott, *Cases*, 285–293; * Snow, *Cases*, 161–171; Soldan, *Extradition des criminels politiques* (1882); Taylor, § 212; Ulmann (2nd ed.), § 129, IV; 1 Westlake, 247–248.

The student should especially study the case of *In re Castini* (1890), L. R. Q. B., Div. 149, and Scott, 163, or Snow, 285. See also the cases of *Cazo*, 1 Moore, on *Extradition*, 324, and Snow, 161; *The St. Alban's Raid*, 1 Moore, 322, or Snow, 162; the *Salvadorean Refugees* and *San Ignacio Raid*, in 4 Moore, *Digest*, § 604, pp. 334 ff.; and the case of *Rudowitz*, Maxey, in the *Green Bag* for April, 1909.

[80] In the *Barrundia case* (1890), Mr. Mizner, U. S. Minister to Central America, was unjustly censured and recalled by President Harrison for having advised the surrender of General Barrundia, a Guatemalan political refugee who had taken passage on the Pacific Mail Steamer, then anchored in transit in the port of San José de Guatemala. General Barrundia resisted capture and was killed. 2 Moore, *Digest*, § 307, pp. 871–877. Secretary Blaine's labored defense of our Government's position in this case fails to carry conviction. A more correct statement of the law is that of Secretary Bayard in the case of *Gámez* (2 Moore, pp. 867–868, and Snow, *Cases*, 149). See also the case of *Sotelo*, 2 Moore, 856, Snow, 147, and Scott, 273–275 n. In 1893 Honduras promptly disavowed all responsibility for the firing upon the American steamer *Costa Rica* because her captain refused to surrender Dr. Bonilla, a political refugee. 2 Moore, pp. 879 ff.

There is no right of asylum appertaining to individuals. So far as this so-called right exists, it belongs to the State; but to this right there is attached no corresponding duty.

In the absence of treaty obligation, every State has of course the right to give or withhold asylum to foreigners, including criminals, political offenders, and fugitive slaves. But it has no right to harbor criminals either on its warships or in legations.[81] It is also agreed that, except in Spanish-American States (where a special usage seems to have obtained recognition) and perhaps in the Orient, legations and consulates no longer have the right of granting asylum to political refugees.[82]

A different practice appears to obtain in the case of warships. It would seem that according to general usage, commanders of warships may, under circumstances of serious danger and at their discretion, grant asylum to political refugees from motives of humanity upon condition of observing a strict neutrality between both parties. But asylum should never be offered nor should the refugees be permitted to maintain communication with the shore. The same principles probably extend to fugitive slaves.[83]

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[81] See *infra*, §§ 209, 278. In no case may a process be served on board a public vessel, nor can one charged with crime be even forcibly removed. Ordinary criminals should be given up upon proper demand. But the demand should be made diplomatically and, in extreme cases, the vessel might be refused the hospitality of the port.

The immunities of legations are not as great as those of warships. It is now generally admitted that an ambassador or other foreign minister cannot afford shelter to ordinary criminals, even to servants of the embassy, if the offense charged is committed outside the minister's residence. But the arrest should, if possible, be arranged diplomatically, and the convenience or wishes of the minister should be carefully consulted. See *infra*, p. 294 as to the time and mode of arrest.

[82] The right of asylum of legations has almost disappeared in European practice. The classic case is that of the *Duke of Ripperda* (1726). See Ch. de Martens, *Causes célèbres*, 174, and Snow, *Cases*, 139. But owing to the frequency of political revolutions, it still persists in Spanish-America and perhaps in Spain where it was revived during the Carlist Wars in the middle of the nineteenth century. There was a case in Spain as late as 1873. There have also been a few sporadic cases in southeastern Europe, one in Greece (1862), and one in Constantinople (1895). The practice also obtains in some parts of the Orient.

The United States discourages the practice in Spanish-American States, but does not prohibit it entirely. For the opinion of Secretary Fish and the Instructions to diplomatic agents issued by our State Department on this point, see Snow, *Cases*, 142, and *Ibid.*, *Int. Law*, 28. See also 2 Moore, *Digest*, §§ 295–304, particularly § 300, for the views of Secretary Fish.

[83] For the instructions of the British Admiralty and the Regulations of the

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United States Navy on these points, see 2 Moore, *Digest*, § 305, and Snow, *Int. Law*, 29.

Art. 28 of the General Act of the Brussels Conference of 1890 provides that "any slave who may have taken refuge on board a ship of war flying the flag of one of the Signatory Powers shall be immediately and definitely freed; such freedom, however, shall not withdraw him from the competent jurisdiction if he has committed a crime or offense at common law." On *Fugitive Slaves*, see especially Perels, 126–131.

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PART III

INTERCOURSE OF STATES

CHAPTER XVII

RIGHTS AND DUTIES OF DIPLOMATIC AGENTS AND SOVEREIGNS

I. Diplomatic Agents

256. **The Head or Chief of State.** — The supreme organ and representative of a State in its diplomatic relations is the Head or Chief of the State. He may be either a monarch or a President.[1] He represents the State in its international relations with all other sovereigns; and, if traveling or resident in other States, is entitled to certain honors and marks of respect.[2] His person, residence, and suite are inviolable, and he is exempt from local jurisdiction in criminal and civil, as also in certain fiscal matters. It will be more convenient to consider these immunities after we have studied those of diplomatic agents.[3]

257. **Minister of Foreign Affairs.** — The actual control or management of international relations is usually in the hands of the Secretary or Department of State for Foreign Affairs.[4] He supervises the work of public ministers and other diplomatic agents sent abroad, and he conducts the business of the State in its relations with the various members of the *diplomatic corps*.[5]

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[1] The monarch or President may be the nominal rather than the real Head of the State, as in the case of the King of England and the President of France. In Switzerland, which has a plural executive, the President of the Federal Council represents the State in its international relations.

[2] Unless he chooses to remain *incognito*. On this subject, see especially 1 P.-Fodéré, *Cours de droit diplomatique* (2nd ed., 1899), chs. 2 and 4.

[3] See *infra*, § 281.

[4] On the *Organization of the Departments of State and the Duties of a Minister of Foreign Affairs*, see 1 P.-Fodéré, *Corps*, ch. 6; Foster, *Am. Diplomacy*, 103–135; and Schuyler, *Am. Diplomacy*, 1–40. For a *History of the Department of State of the United States*, see a series of articles by Gaillard Hunt, in 1–5 *A. J.* (1907–1911), *passim*.

[5] The *diplomatic corps* consists of all the ministers of diplomatic agents accredited

258. **The Right of Legation.** — The main instruments of diplomatic intercourse are public ministers or other diplomatic agents. Every sovereign State enjoys the active and passive rights of legation or representation, *i.e.* the rights of sending and receiving diplomatic agents.[6] But there is no corresponding obligation to send and receive foreign ministers, though a State which refused all diplomatic intercourse would practically lose its membership in the international community.

259. **The Right to refuse a Particular Individual.** — Each State is free in the choice of its agents, though the Government to which they are accredited is not, strictly speaking, bound to receive them. It may refuse to enter into or to continue diplomatic relations with a particular State, but under certain circumstances such refusal might be construed as unfriendly, or even hostile.[7] It may, of course, refuse to enter into negotiations which have a particular purpose. A State may decline to receive a particular agent who is *persona non grata*, one of its own citizens or subjects, or one whose duties or powers are deemed incompatible with the institutions of the receiving State.[8]

But the grounds for rejection should not be frivolous and should be clearly stated, if possible.[9] In order to avoid unpleasant incidents of this nature, it is customary (though not obligatory) to

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to a particular government. It possesses a certain sense of solidarity or collectivity and sometimes speaks with a certain authority, more particularly in the Orient, on questions of ceremony or diplomatic etiquette; but it is in no sense a legal or even a political personality. Its members are completely independent of one another. The dean or presiding officer of the diplomatic corps is usually its oldest ranking member or the Papal Nuncio. The term is also sometimes applied to all the diplomatic agents sent abroad by a particular State.

On the *diplomatic corps*, see especially 2 Fiore, No. 1111; 1 P.-Fodéré, *op. cit.*, 253–256; and 1 Rivier, 452–453.

[6] But the exercise of this right is discretionary. Several authorities (Heilborn, 182, and Wheaton, § 207) claim that this is a mere competence rather than a right. It would seem to be both. It is in fact a fundamental right of States. See *supra*, § 148.

Part-sovereign States may enjoy a more or less limited right of legation. See *supra*, §§ 101–105. The Pope enjoys the right by courtesy based on traditional usage, but his agents are not real international functionaries. See *supra*, § 89, p. 95.

[7] See *infra*, §§ 267–269.

[8] Thus, Protestant States do not, as a general rule, receive Papal envoys. Most countries, including the United States, will not receive their own nationals. A *persona non grata* is one who is unacceptable on personal or political grounds.

[9] England insists upon a statement of the grounds of rejection in all cases. But her practice appears to be exceptional. It is not legally obligatory.

make confidential inquiries beforehand as to whether the appointment of a certain person would be agreeable to the Government of the country to which he is to be accredited. This custom is usually referred to as *l'agreation* (agreement).[10]

260. **Duties of Diplomatic Agents.** — The main duties or functions of permanent diplomatic agents are those of observation, protection, and negotiation. It is the duty of the resident minister to observe and report upon all matters of interest to his Government, to protect by means of his mediation or good offices[11] nationals of his own State against acts of illegality and injustice in the country to which he is sent, and to enter into negotiations for the purpose of settling any outstanding difficulties between his own Government and that to which he is accredited. But he may perform other miscellaneous functions, such as the registration of births, marriages, and deaths of his fellow nationals, the authentication of certain documents, the issuance of passports, etc. In no case should he intervene in the internal affairs of the country by which he has been received.[12]

261. **Classification of Public Ministers.** — In accordance with the rules adopted at the Congress of Vienna (1815), supplemented by that of Aix-la-Chapelle (1818), public ministers are divided into four classes:

(1) Ambassadors and Papal Legates or Nuncios.[13]

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[10] On *l'agreation*, see especially 2 P.-Fodéré, *Cours*, 395 ff. The United States has had several disagreeable experiences as a result of its failure to observe this custom. On the famous *Keiley* case, see 4 Moore, *Digest*, pp. 480–483. For this and other cases, see also *Ibid.*, § 638; * Hall (6th ed.), 293–294 and n.; 1 Oppenheim, § 375; 1 Rivier, 456; Taylor, §§ 289–290; Foster, *Practice of Diplomacy*, ch. 3.

Since the United States began to appoint ambassadors in 1893, it has observed the practice of *agreation* for envoys of that grade.

[11] But he should not act as an agent for the collection of private claims. 4 Moore, *Digest*, § 647.

[12] See 1 Moore, *Digest*, § 649, for the case of *Gouveneur Morris*.

On the *Duties of Diplomatic Agents*, see especially Bonfils (Fauchille), Nos. 681–683; Despagnet, Nos. 229–230; * 1 Moore, *Digest*, §§ 647 ff.; 1 Oppenheim, §§ 378–383; 1 P.-Fodéré, *Cours*, ch. 10; *Ibid.*, *Traité*, Nos. 1346 ff.; * 1 Rivier, § 37, pp. 467 ff.; Foster, *Practice of Diplomacy*, chs. 5 and 6.

[13] It may be recalled that Papal Legates or Nuncios are no longer to be regarded as real public ministers since the abolition of the temporal power of the Pope in 1870. Ambassadors are supposed to represent the person and dignity of their sovereign in a personal sense and are entitled to precedence and special honors, such as the right of personal audience with the sovereign and royal honors generally.

(2) Envoys, Ministers, or other persons accredited to Sovereigns.[14]

(3) Ministers Resident accredited to sovereigns.

(4) Chargé d'Affaires accredited to Ministers for Foreign Affairs.

262. **Necessary Documents.** — Before setting out on his mission, a public minister is in general furnished by his home Government with the following documents:

(1) A *Letter of Credence*, stating the name, rank, etc., of the agent, together with the general object of his mission, and bespeaking for him full faith and credit in the conduct of the business with which he is charged. This Letter of Credence is usually addressed by his sovereign to the sovereign or Chief of State to whom he is accredited.[15]

263. **Full Powers.** — (2) *Full Powers*, or authority to negotiate. These Powers may be contained in the Letter of Credence[16] or conferred by letters patent. Their purpose is to define the limits within which the agent may negotiate and to what extent his acts may be considered binding on his Government. Full Powers are no longer interpreted or understood as legally binding upon the sovereign, the right to ratify being in all cases either expressly or tacitly reserved.[17]

264. **Instructions.** — (3) *Instructions* are directions furnished to the agent by his home Government, either at the beginning or

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[14] This class may be said now to include Permanent Envoys, Ministers Plenipotentiary, and Envoys Extraordinary. There is no substantial difference between the first three classes.

For curious information and amusing incidents growing out of the struggles for precedence which formerly prevailed between public ministers, see Bernard, *Lectures on Diplomacy*, Lect. I; 4 Macaulay, *History of England* (ed. 1855); and Wicquefort, *L'ambassadeur et ses fonctions* (1676).

[15] Except in the case of a Chargé d'Affaires, when it is written by one Foreign Minister to the other. For details on *Letters of Credence, Full Powers, Instructions*, etc. see especially 1 P.-Fodéré, *Cours*, ch. 9, pp. 403 ff.; * 1 Twiss, §§ 212–214; and Wheaton, §§ 217–220.

[16] In case of a permanent minister, the Full Powers are usually inserted in the Letter of Credence or, rather, the Letter of Credence ordinarily serves as authority to negotiate. But when the minister resident is charged with a special task, as, for example, the negotiation of a commercial treaty, he is furnished with special letters patent for this purpose. Envoys or ministers sent to a Congress or Conference are not generally furnished with Letters of Credence, but with General Full Powers, copies of which are exchanged. *Cf.* Hall (6th ed.), 295; and 1 P.-Fodéré, *op. cit.*, 422.

[17] On this much-controverted point, see *infra*, § 298.

in the course of his mission, to serve as a guide in his relation with the Government to which he is accredited or in the conduct of negotiations. They usually state the object of the mission, lay down rules for the transaction of his business, and inform him as to the extent of his powers or the real intentions of his Government. These instructions may be general or special, oral or written (they are usually written), secret or public. They may be changed or modified in the course of the negotiation.[18]

265. **Other Documents.** — (4) *Special Passports* and, in some cases, a *Safe-conduct.* These contain a description of the agent's person and office and authorization to travel to the seat of the Government to which he is sent. (5) The *Cipher* or secret key for communication with the home Government.

266. **The Commencement of the Diplomatic Mission.** — " When a diplomatic minister reaches the capital of the country to which he is accredited, he notifies his arrival to the Minister for Foreign Affairs and demands an audience of the Sovereign for the purpose of delivering his Letters of Credence. Ambassadors are entitled to a Public Audience, whereas ministers of the second and third classes have only a right to a Private Audience, and Chargés d'Affaires are obliged to be content with an audience of the Foreign Minister." [19] Though it is only after this public reception that a public minister enters upon the actual exercise of his functions and is fully entitled to diplomatic privileges and immunities as a matter of strict law,[20] it is customary to accord them

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[18] They are generally secret, and should not be communicated without the consent or direction of the home Government. It has happened that negotiators have been furnished with a double set of instructions — one secret, the other to be communicated. Rivier (I, 464) justly observes on this point: "The respect and loyalty which States owe one another requires that these (instructions) be not contradictory."

[19] Lawrence, *Principles* (4th ed.), p. 308.

[20] This appears to be the view of most of the authorities, but they are not all agreed upon this point. While international practice seems to support the opposite view from that set forth in the text, it is difficult to find in this custom a sound basis for a principle of public law. As the diplomatic relation is a mutual one, it can scarcely be maintained that full or legal immunity can be conferred by the sending State alone.

However, it would appear that a limited application of the principles of inviolability and immunity from arrest or detention apply during the voyage, even through third countries. The minister and his suite are protected by their pass-these rights and immunities during their voyage to the seat of the Government to which they are accredited and while awaiting their formal reception.

267. **The Termination of Diplomatic Missions.** — Diplomatic missions terminate by the death or recall of the minister; the expiration of the term fixed for the duration of the mission; the success or failure of the object of the mission if it be of a

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ports or public character, provided the third State is not at war with the sending or receiving State. The case of *Soulé* is an interesting one. In 1854 Mr. Soulé, United States Minister at Madrid, was provisionally stopped at Calais, France, under an order of the French Minister of the Interior that he should be not allowed to "penetrate into France" without the knowledge of the French Government. Upon the protest of the United States Minister at Paris, the French Minister of Foreign Affairs replied that the Government of the Emperor had "not wished . . . to prevent an envoy of the United States crossing French territory to go to his post in order to acquit himself of the commission with which he was charged by his Government;" that "if Mr. Soulé was going immediately and directly to Madrid, the route of France was open to him;" that if, on the contrary, he "intended to go to Paris with a view of tarrying there, that privilege was not accorded him." It was explained that he had been stopped with a view of consulting him as to his intentions.

It should be explained that Mr. Soulé was a native of France and a naturalized American citizen. He had fought a duel with the French ambassador at Madrid and was reported to have criticised the Government of Louis Napoleon. 4 Moore, *Digest*, 55 f.

On the *Right of Transit or Innocent Passage of Public Ministers*, particularly as illustrated by the case of *Soulé*, see especially 3 Calvo, §§ 1532–1536; Foster, *Practice of Diplomacy*, 53 f.; *Hall, 301 ff. and note on 302 f.; *4 Moore, *Digest*, § 643; 1 Oppenheim, § 308; Pomeroy, §§ 340 f.; 3 P.-Fodéré, *Traité*, No. 1257; Rivier, § 39, pp. 508–512; Taylor, §§ 293–294; 1 Twiss, § 222; 1 Westlake, 264–265; Wheaton, §§ 244–247.

The right for public ministers of innocent passage through third States and immunity from civil suit has judicial sanction, at least in the United States. See *Wilson* v. *Blanco* (1889), 56 N. Y. Superior Court, 582, and Scott, 206. This right probably exists to a certain extent even on belligerent or occupied territory. It is, of course, subject to the law of military necessity.

During the siege of Paris, in 1870, the diplomatic corps protested against the refusal of Count Bismarck to permit them to correspond with their Governments, except by means of "open letters." The United States especially remonstrated against this refusal as an "uncourteous proceeding," and maintained that the rights of legation "must be regarded as paramount to any belligerent right" under the circumstances. 4 Moore, *Digest*, § 675, pp. 696–701. See also 3 Calvo, § 1538; Hall (6th ed.), 304 ff.; 1 Oppenheim, § 452; Pomeroy, § 341; Taylor, § 296; 1 Westlake, 265; and Odier, *Des privileges des agents diplomatiques*, 84–89.

It is clear, at least since the discussions growing out of the *Trent Affair* (see *infra*, p. 511 n.), that the diplomatic agent of an enemy State cannot be taken from a neutral vessel or on neutral territory. Neutral States have a right to the use of the high seas for diplomatic communication with either belligerent as well as with one another.

special nature; the death, abdication, or dethronement of the sovereign or Chief of State to whom or by whom the minister has been accredited;[21] dismissal or withdrawal as a consequence of some serious offence on one side or the other; a change in the rank or class of the agent or embassy; a declaration or outbreak of war; or a radical change in the form of government of either country. In every case the diplomatic agent retains his privileges and immunities until his return to his own country.

268. **Recall of Ministers.** — The normal and most frequent mode of termination is by *Recall*. Before his departure, a public minister usually has another audience with the sovereign or foreign minister, and presents his Letter of Recall. He receives in return a letter or papers of commendation (*lettres de récréance*), his passport, and, at some courts, presents or decorations.[22]

Just as a State may, on reasonable grounds, decline to receive any particular person as a public minister, so it may, at any time, demand the recall of a resident minister or other diplomatic agent,[23] for good and sufficient reasons; if, for example, the minister has rendered further intercourse difficult or impossible or if he has made himself personally obnoxious to the sovereign or foreign minister of the Government to which he is accredited. Such a request, if made in good faith and for sufficient reason, should be at once complied with, but there can be no legal obligation in the matter.[24] The Government by whom the minister has been accredited has the right to pass upon the facts and decide for itself whether the conduct of its agent has been such or whether its interests in the premises are of such a nature as to make it desirable to comply with the wishes of the Government which has requested the recall.

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[21] In case of death, the Letter of Credence is usually renewed; in case of abdication or dethronement, the minister is provided with a new Letter. These rules do not necessarily apply to Chargés d'Affaires who are merely accredited by one Foreign Minister to another. A radical change in the form of government also requires new Letters of Credence. The election of a new President in a Republic does not terminate the mission.

[22] It was formerly a general custom to send presents to all departing ministers whose mission was not terminated abruptly. Fortunately, this custom has almost disappeared from international practice, but some courts still confer orders and decorations suitable to the rank of the minister. The United States set a good example in refusing to give or permit the acceptance of such presents or decorations. See especially Foster, *Practice of Diplomacy*, 141 ff.; 4 Moore, *Digest*, § 651; and 3 P.-Fodéré, *Traité*, No. 1521.

[23] The sending State may of course recall any of its ministers or agents at its own discretion.

[24] For the contrary but erroneous view, see 3 Calvo, § 1365; and 1 Halleck

(3d Baker's ed.), 366. For the correct view, see Hall (6th ed.), 298; Lawrence (3d ed.), § 146; and Taylor, § 321.

Generally speaking, the Continental authorities present a very inadequate or superficial discussion of this question. This may possibly be due to the fact that the United States appears to have furnished most of the instances of requests for recall, as of dismissal of public ministers.

The circumstances which led to the request for the recall of the French minister *Genet* in 1792 are so well known to nearly every schoolboy in the land that it is unnecessary to recapitulate them here. Suffice it to say that his conduct was such that our Government would have been amply justified in sending him out of the country.

The request of the French Government for the recall of *Gouverneur Morris* made at the same time was also fully justified. Morris had been engaged in intrigues in favor of the monarchical or Court party.

The United States seems also to have been justified in its request for the recall (in 1871) of the Russian Minister *Catacazy*, who had rendered himself personally obnoxious by conversation and publications abusive of President Grant.

The most recent incident of this sort is that of the Spanish Minister *De Lôme*. On Feb. 8, 1898, the New York *Journal* published a private letter abstracted from the mails at Havana by a Cuban sympathizer, in which the Spanish Minister had described President McKinley as "weak and a bidder for the admiration of the crowd, besides being a would-be (or rather second-rate) politician (*politicastro*)"; and he intimated that it would be advantageous for Spain to take up, "even if only for effect," the question of commercial relations. The United States promptly asked for his recall; but De Lôme, recognizing that his usefulness was at an end, had offered his resignation before the matter could be laid before the Spanish Government. It was promptly accepted.

For these and other cases, see * 4 Moore, *Digest*, § 639.

Though it is not strictly obligatory to accede to a request for recall, "the instances must be rare indeed in which such a request ought not to be granted." Mr. Buchanan, Secretary of State, to Mr. Jewett, 1847, 4 Moore's *Digest*, p. 494.

Reasons for the request should always be given, if possible. In 1852 Secretary Everett refused to give reasons for a request for the recall of the Minister from Nicaragua, but these reasons were afterwards given. Moore, *op. cit.*, p. 498.

That a government must be its own judge as to the validity of alleged reasons is shown by the circumstances which led to the request for the recall of the United States Minister Wise by the Brazilian Government in 1847. The conduct of Mr. Wise in attempting to secure the release of Lieut. Davis and the American sailors who had been imprisoned by the Brazilian authorities, was highly approved by the United States Government, and his subsequent failure to appear at several Court fêtes (the acts nominally alleged as reasons for his recall) was due to a sense of "recent insult and indignity." No government could afford to recall a minister under circumstances which involved an implied censure for acts of which it heartily approved. 4 Moore, *op. cit.*, 495-497.

269. **Dismissal of Ministers.** — A minister should only be positively dismissed[25] under the most extreme circumstances, as when hostilities are on the point of breaking out, an impossible ultimatum has been delivered, if his Government has positively refused reparation for a serious wrong, when his personal conduct has been such as to make it practically impossible to continue further relations with him, or in case of interference in internal or domestic affairs.[26]

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[25] This is done by sending him his passports and, if necessary, escorting him to the frontier.

[26] Hall (p. 299 of 6th ed.), who exhibits an anti-American bias upon several occasions in his otherwise admirable work, sneeringly remarks: "The United States has had the misfortune to supply almost all the modern instances in which a Government has felt itself unable to continue relations with a minister accredited to it." Upon a superficial view this reproach appears to be deserved, but an impartial examination of the cases themselves will show that, except in one instance, the dismissals were wholly justifiable. Indeed, it must be admitted that, in some of these cases, our Government showed a forbearance bordering upon pusillanimity.

The first of these unfortunate cases was that of the Spanish Minister *Yrujo* in 1804–1806. After denouncing an Act of Congress as "an atrocious libel," Yrujo attempted (in 1804) to corrupt the editor of a newspaper by offering a pecuniary consideration for opposing certain measures and views of the Government of the United States and advocating those of Spain. Though the Spanish Government had granted him "permission" to return to Spain in response to a request for his recall, Yrujo failed to take his departure, and returned to Washington early in 1806, where he was officially informed that his presence was "dissatisfactory" to the President. Thereupon he notified the United States Government that he intended to remain in Washington as long as it might suit the "interests of the king" and his own "personal convenience," and that he remained in possession of all his rights and privileges. He not only communicated his correspondence with our Government to his colleagues of the diplomatic corps, but he also caused it to be published in the newspapers. His conduct appears, however, to have been approved by the Spanish Government. Though virtually dismissed early in 1806, he remained in the country until late in 1807. Together with Merry, the British Minister, Yrujo was also implicated in the Burr conspiracy.

On the *Yrujo Incident*, see especially 2 Adams, *History of the U. S.*, 258–268, 362–373; 3 *Ibid.*, 184–189, 194, 209, 236–264; Foster, *Am. Diplomacy*, 217–220, 225; * 4 Moore, *Digest*, § 640, pp. 508–511; 1 Wharton, *Digest*, §§ 84 and 107, pp. 605 and 698.

The second case is that of the British Minister *Jackson* in 1809–1810, who twice intimated that our Government had been guilty of falsehood and duplicity in its negotiations with the British Government. He was consequently informed that no further communications from him would be received, and Mr. Pinkney, then United States Minister in London, was instructed to ask for his recall (Nov. 23, 1809). Diplomatic relations having been suspended pending his recall, Mr. Jackson was finally (March 14, 1810) directed to return to England, though Lord Wellesley stated that his conduct was not disapproved by the British Government.

In the meantime Mr. Jackson had withdrawn from Washington to New York

270. **The Fiction of Exterritoriality.** — For the sake of preserving harmonious relations, and in order to ensure independence or freedom in the exercise of their functions, diplomatic agents enjoy certain privileges and immunities in the countries to which

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and Boston, where he gave a toast "so flagitiously insolent to the Government of the United States that Mr. Madison was compelled to direct that his recall should be immediately demanded." Any one who will read the amusing note published by Mr. Wharton in his *Digest* (I, § 107, pp. 107 ff., reprinted in 4 Moore, § 640, pp. 515 ff.), cannot fail to be convinced that if the administration of Mr. Madison is subject to criticism in this matter, it is that it was insufficiently vigorous.

On *Jackson's Case*, see 5 Adams, *History*, 96–132, 154–157, 212–219; Foster, *Am. Diplomacy*, 220–223; *4 Moore, 511–525; *1Wharton, 606–609, 713–723.

In 1849 Secretary Clayton refused to hold any further correspondence with the French Minister *Poussin* on the ground that he had used language disrespectful to our Government. 4 Moore, pp. 531–533.

In 1856 Secretary Marcy announced to the British Minister Mr. *Crampton* the determination of the President to "discontinue further intercourse" with him on the ground that he had continued to violate the Neutrality Laws of the United States by participation in the recruiting of troops for the Crimean War after he had been admonished not to do so. His recall had been refused by the British Government which placed a different construction upon our Neutrality Laws than maintained by the United States. 4 Moore, pp. 533–535.

The most recent case is that of *Lord Sackville-West*, a curious "breach of diplomatic privilege and invasion of purely domestic affairs." During the Presidential campaign of 1888, the British Minister was made the victim of a common electioneering trick. He received a letter marked "private," purporting to come from a naturalized Anglo-American residing in California, asking his advice as to the Presidential candidate most likely to favor British interests. In his reply to this decoy letter, Lord Sackville intimated that the Democratic party was secretly, though not openly, friendly to Great Britain, and he inclosed an extract from a newspaper in which electors were advised to vote for President Cleveland.

The letter was published a few weeks before the election, and used as a campaign document against the candidate whom it was intended to favor. The situation was rendered more difficult by reason of Lord Sackville's unsuccessful attempts to explain matters to American newspaper reporters, in the course of which he accused the administration of acting for political effect. Secretary Bayard promptly cabled Mr. Phelps, the United States Minister in London, to request his lordship's recall as speedily as possible.

Lord Salisbury properly declined to act until he had received Lord Sackville's explanation, but suggested that dismissal was preferable to immediate recall, as dismissal need not end his diplomatic career. Inasmuch as election day was drawing nigh, Lord Sackville promptly received his passports.

The British Minister was undoubtedly guilty of an indiscretion, but it cannot be seriously maintained that his offence was of such a character as to justify a dismissal or even a demand for recall. Indeed, the London *Times* (cited by Foster, *Practice of Diplomacy*, 189) scarcely put the case too strongly when it said: "A more ridiculous spectacle has rarely been witnessed in any civilized country than the flurried and unmannerly haste with which the Government of President Cleveland has endeavored to put a slight on this country, obviously for electioneering purposes, they are accredited. These rights have frequently been grouped under the head of exterritoriality. But there is a growing disposition on the part of the more recent authorities to frown upon the use of this term as a useless, misleading, if not dangerous fiction or metaphor.[27]

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before Her Majesty's ministers could deal, one way or the other, with the alleged indiscretion of the British representative at Washington."

However, the case has its extenuating circumstances. Perhaps the very absurdity or humor of the situation prevented too great resentment on the part of the English. They knew that the Irish vote was not to be trifled with.

On the *Sackville Incident*, see 6 Calvo, § 258; * Foster, *Practice of Diplomacy*, 187–189; Hall (6th ed.), 300–301 n.; 1 Halleck (3d ed.), 367 f.; Lawrence (3d ed.), § 146; * 4 Moore, *Digest*, § 640, pp. 536–548; Taylor, § 322; Wheaton (Atlay's ed.), § 225 d.

There is one other case of dismissal deserving of special mention to which the United States was *not* a party. It is that of Mr. *Bulwer*, British Minister at Madrid in 1848. Acting upon the instructions of Lord Palmerston, he warned the Spanish Government of the danger of the course it was taking in not pursuing a sufficiently liberal policy, and recommended the adoption of a legal and constitutional course of government. To this interference in its domestic affairs, Spain replied by sending Mr. Bulwer his passports with an intimation that he must leave Madrid within forty-eight hours.

This case is particularly important because Lord Palmerston, though clearly wrong in applying them in this case, laid down the correct principles governing the conditions under which a demand for the recall of a public minister should be complied with. They are thus summarized by Lord Salisbury:

"It is, of course, open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other State, or with any particular minister of any other State. But it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless that State is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made." 4 Moore, *Digest*, p. 538. The reply of Secretary Bayard to this argument (pp. 539 ff.) is unconvincing. He is misled on this point by the "high authority" of Calvo (see p. 547).

On the *Bulwer Incident*, see 3 Calvo, § 1515; * Hall (6th ed.), 300; * 4 Moore, § 640, pp. 538–539, 545–546; Taylor, § 322.

[27] Among those opposed to the idea of exterritoriality as a principle of Int. Law, may be cited: Barthélemy, in 13 *R. D. I. P.* (1906), 125 f.; Bonfils (Fauchille), No. 693; Bry, Nos. 214, 245, 249; Crouzet, *De l'inviolabilite et de l'exemption de juris-diction* (1875), 71 ff.; Dana, note 129 to Wheaton; Despagnet, Nos. 233, 238, 251; 2 Fiore, Nos. 1147, 1154, 1161; Hall (6th ed.), 165–166, 197–198; 1 Halleck (Baker's 3d ed.), 332 ff.; Kebedgy, *Die diplomatischen Privilegien* (1901), 8 ff.; Lawrence (3d ed.), § 120; 2 Mérignhac, 249–257; 4 Moore, *Digest*, 630 f.; 2 Nys, 366 ff.; Odier, *Des privileges des agents diplomatique* (1890), 307 ff.; Ortolan, *Elements de droit penal*, § 521; Piétri, *La fiction d'exterritorialité* (1895), ch. 2; 2 P. Fodéré, *Cours*, 47–50; 3 *Ibid.*, *Traité*, Nos. 1396–1397; Pinheiro-Ferreira, notes *sur le Précis de* G. F. de Martens, II, §§ 172, 215; 1 Westlake, 263; Ullmann (2d ed.), § 50, p. 183.

Among those in favor of exterritoriality, either as a right or a useful legal fiction,

1. *Inviolability*

271. **The Principle of Inviolability. Its Application.** — The main special right or privilege of diplomatic agents is that of inviolability or exemption from restraint, injury, or interference. This principle, based originally upon the supposed sacred character of the herald or envoy and sanctioned by religion, was one of the oldest and most fundamental "laws of all mankind"[28] known to the ancients. It extends to the family and suite as well as to the person of the agent, and applies to all things or persons necessary for the accomplishment of his mission, such as his residence,[29] furniture, carriages, archives, couriers, and correspondence. It begins as soon as the envoy enters the country to which he is accredited, and only ends when he leaves it, even in case of a rupture or suspension of diplomatic relations.

272. **In Third Countries.** — The authorities are divided on the question whether the diplomatic agent is inviolable in third countries which he is obliged to traverse in order to reach his destination; but the better opinion would seem to be that he enjoys a limited inviolability conditioned on his good behavior, and the right of innocent passage, provided the third State is

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are the following: Bluntschli, Arts. 135–153; Bynkershoek, *De foro legatorum* (1721); 3 Calvo, §§ 145 ff., 1499 ff.; Droin, *L'exterritorialité* (1895), 57 ff.; Funck-Brentano et Sorel, 63–64; Geffcken, in 3 Holtzendorff, 654; Grotius, lib. II, cap. 18; Heffter, § 205; Heyking, *L'exterritorialité* (1889), § 41; Klüber, §§ 49, 204; Liszt (3d ed.), pp. 74, 113, and 119 ff.; Lehr, *Manuel*, Nos. 1071 ff.; Lisboa, *Les fonctions diplomatiques*, 3; 2 G. F. de Martens, §§ 172 and 215; 1 F. de Martens, § 82; 2 *Ibid.*, § 12; 1 Lorimer, 248; Neumann, § 205; 1 Oppenheim, § 389; 1 Piédelièvre, Nos. 488 ff.; 2 Phillimore, §§ 104, 108, 140, 176 ff.; 1 Rivier, 330–335, 417 ff., 481–499; Stoerk, in 2 Holtzendorff, 656; Vattel, liv. IV, ch. 9, § 117; Vercamer, *Des franchises diplomatiques* (1891), 142 ff.; 1 Twiss, §§ 165 and 217; Wheaton, § 224.

These authorities differ greatly from each other as to the nature, basis, and extent of exterritoriality. Some consider it a mere fiction, others a legal right or principle; some make it include inviolability, others restrict it to immunity from criminal and civil jurisdiction; some extend it to the person and suite of the agent, others limit to the hotel, etc., etc.

The main objections to this term are well summed up by Kebedgy (*Diplom. Privilegien*, 1901, p. 8): It is insufficient, since jurisdiction is not exclusively territorial; incorrect, inasmuch as the hotel or residence of the embassy is not, under all circumstances, exempt from local jurisdiction; unnecessary, because the immunities are explicable on other grounds. It is also dangerous, as apt to give rise to extravagant pretensions.

[28] See *supra*, § 33.

[29] See *infra*, § 278.

not at war with the sending or receiving State.[30] He is also probably immune from arrest and detention[31] except in serious cases, but it is doubtful whether he is legally entitled to any other immunities in third States.

273. **Limits of Inviolability.** — Except in cases of necessity or self-defense,[32] the right to inviolability in the country which receives them, is nearly absolute. In most countries public ministers are protected by special laws.[33] In any case there is an

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[30] *Cf. supra*, note on p. 280.

As in favor of the view that diplomatic agents are inviolable in third States, Bonfils (No. 689) mentions Vattel, Merlin, Holtzendorff, Klüber, de Martens, Wheaton, Travers, Twiss, and Lorimer; as opposed, Grotius, Bynkershoek, Gentilis, Zouch, Wicquefort, Heffter, Calvo, and Carnazza-Amari. Bonfils himself shares the affirmative opinion. To this affirmative list may be added: Halleck, Taylor, Ullmann, Phillimore, Rivier; to the negative list, Hall, Oppenheim, Mérignhac, Pomeroy, P.-Fodéré, and Westlake.

It should be added that the Institute of Int. Law suppressed Art. 19 of the Rules on Diplomatic Immunity adopted in 1895. This article had recognized the inviolability and immunities of public ministers in third countries. See 14 *Annuaire*, 239.

[31] *Wilson* v. *Blanco* (1889), 56 N. Y. Superior Court, 582, and Scott, 206. For a criticism of this decision, see 1 Westlake, 265–266 n.

[32] When the safety of the State is threatened, as in cases of conspiracy; voluntary exposure to danger, as in case of a riot, an assault, acceptance of a duel, etc.; or when the diplomatic agent is traveling incognito.

The classic cases of conspiracy are *Count Gyllenborg*, Swedish Ambassador to England (1717), and the *Prince of Cellarmare*, Spanish Ambassador to Paris (1718). Both were placed under arrest and held as prisoners. These cases are cited in nearly all the treatises. For full reports, see 1 Ch. de Martens, *Causes célèbres*, 75–138 and 139–173. For brief reports, see Snow, *Cases*, 87–88.

"A foreign minister, by committing the first assault, so far loses his privilege, that he cannot complain of an infraction of the Law of Nations; if, in his turn, he should be assaulted by the party aggrieved." *U.S.* v. *Ortega*, 4 Wash. Circ. Ct. (1825), 531, citing and affirming *U.S.* v. *Liddle* (1808), 2 Wash. Circ. Ct. 205. See Scott, *Cases*, 197 n.

[33] The Revised Statutes of the United States, §§ 4063–4064, declare any judicial process null and void whereby "the person of any public minister of any foreign prince or State authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attacked"; and every person suing out or executing such process is declared to be "a violator of the Law of Nations, and a disturber of the public repose," and shall be imprisoned for not more than three years and fined at the discretion of the Court, 4 Moore, *Digest*, § 660.

For foreign legislation on this subject, see Heyking, *L'exterritorialité* (1889), § 21; Odier, *Des privileges des agents diplomatiques* (1890), 53–78; and Vercamer, *Des franchises diplomatiques* (1891), ch. 2. France has special press laws providing for the punishment of the defamation of ambassadors, etc. See Odier, 103 ff.; 3 P.-Fodéré, *Traité*, 1385; 2 *Ibid.*, *Cours*, 16–19. For the text of the English law (7 Anne, c. 12), see Blackstone, *Com.*, Bk. I, c. 7, § 255, or Halleck (3d obligation to punish violations of this principle of the Law of Nations on the part of individuals. If an infraction is committed by the Government itself or by one of its officials, suitable reparation by way of explanation, apology, indemnity, etc., must be made.

2. *Immunity from Criminal Jurisdiction*

274. **Immunity from Criminal Jurisdiction.** — Diplomatic agents also enjoy immunity from criminal and civil jurisdiction.[34] Immunity from criminal jurisdiction is absolute. It consists in freedom from arrest and punishment for alleged crimes or violations of law by the local authorities,[35] but this does not mean that public ministers are exempt from obedience to local or municipal law.[36] In case the minister commits a serious crime or offense, he is punishable in his own country, where he is supposed to have retained his domicile, and he is responsible to his own Government, to which the proper representations should be made. A request for his recall may be made or, if his conduct be extremely reprehensible, he may be dismissed, or even, should necessity require it, be temporarily imprisoned or conducted to the frontier.

A public minister cannot be compelled to give evidence or to act as a witness in a lawsuit or criminal trial, though he may, with the consent of his Government, waive this privilege.[37] He

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Baker's ed.), 337–338 n. The ordinary alien is also in a sense inviolable, *i.e.*, as entitled to the protection of the ordinary law and the courts; but the diplomatic agent is inviolable in a special sense.

[34] These immunities are closely connected, and partly identical with inviolability, of which they seem to be a consequence and from which they cannot be completely separated.

[35] This is well shown by Beling, *Die strafrechtliche Bedeutung der Exterritorialität* (1896), §§ 4–6.

[36] This includes freedom from police jurisdiction as well, but public ministers are expected to observe local police or municipal regulations relating to sanitation, fire protection, license taxes for hunting, etc. In case of failure to comply with such regulations, complaint may be made to their own Government. On *Police Regulations*, see especially 4 Moore, *Digest*, § 669; and 2 P.-Fodéré, *Cours*, 112–116; 3 *Ibid.*, *Traité*, Nos. 1427 ff.

[37] This privilege was waived by *Señor Comancho*, Minister from Venezuela, who was present at the assassination of President Garfield in 1880. Acting upon instructions from his Government, he gave evidence as a chief witness at the trial of the assassin Guiteau.

cannot, in general, waive his privilege of immunity from criminal jurisdiction without the consent of his sovereign.

3. *Immunity from Civil Jurisdiction*

275. **Immunity from Civil Jurisdiction. Exceptions.** — Diplomatic agents also enjoy a limited immunity from jurisdiction in civil matters. They are exempt [38] in principle, but there are important exceptions like the following:

(1) Real actions, relating to immovables which the minister possesses in the country to which he is sent. With the exception of his residence, these are subject to territorial jurisdiction.

(2) When the agent or minister engages in a trade, profession, or in commerce, he is subject to local jurisdiction in his business or professional dealings.[39]

(3) If he acts in a fiduciary character, such as guardian or trustee, he is liable for the obligations contracted in this capacity.[40]

(4) When the minister, whether with or without the authorization of his government,[41] voluntarily submits to judicial process without pleading his immunity, or if he himself sets the machinery

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In 1856 the *Dutch Minister* refused to appear as a witness at the trial in a case of homicide which had occurred in his presence. He was supported by his own Government and his colleagues of the diplomatic corps. This recall was afterwards requested by the United States Government, which regarded his refusal to testify as discourteous and disrespectful under the circumstances. See especially 3 Calvo, § 1520 n.; 1 Halleck (3d ed.), 353; 4 Moore, *Digest*, § 662; Snow, *Cases*, 98; 1 Oppenheim, § 392.

In countries which permit of such a practice, the deposition of a public minister is usually taken and produced at the trial.

[38] There are a few dissentients (*e.g.* Fiore) from this opinion, but it is the view of the great majority of publicists and has the sanction of international practice.

[39] This is the consensus of opinion among the authorities. But the contrary view was taken by English judges in *Taylor* v. *Best* (1854), 14 Common Bench, 487, and Snow, *Cases*, 90; and in *Magdelena Steam Navigation Co.* v. *Martin* (1859), 2 Ellis and Ellis, 94.

In *Musurus Bey* v. *Godham*, L. R. (1894), 1 Q. B. 533, it was held that the Statute of Limitations does not begin to run against his creditors while a foreign ambassador is in England and accredited to the sovereign.

[40] This would also be the case with property which he received by will or inheritance.

[41] It is a disputed point whether the prior consent of his Government is necessary or not. See especially on this point Piétri, *Étude critique sur la fiction d'exterritorialité* (1895), No. 56.

of justice in motion. In such cases he must bear the judicial consequences of his action, though the means of execution would probably be limited to any real property he may possess.

But as a general rule, diplomatic agents are not subject to suit for debt or in any civil action,[42] and their movable property [43] cannot be seized, attached, or confiscated. Injured parties should address themselves to the Minister of Foreign Affairs,[44] who may, at his discretion, bring the matter to the attention, first of the accused public minister, and later, if deemed advisable, to the Government he represents.

4. *Other Immunities and Privileges*

276. **Fiscal Immunities.** — "The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation.[45]

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[42] For the amusing case of the *Ambassador of Peter the Great* (1708), see Blackstone, *Com.*, Bk. I, ch. 7, § 255, or Snow, *Cases*, 89.

In 1772 the passports of the *Baron de Wrech*, Minister Plenipotentiary of the Landgrave of Hesse-Cassel at the Court of Paris, were withheld for non-payment of debts. The diplomatic corps remonstrated against this act as a violation of International Law. So far as we are aware, it has never been repeated. Snow, 97, and 2 Ch. de Martens, *Causes célèbres*, 110–121.

[43] See *Wheaton's case* (4 Moore, *Digest*, § 663; Snow, *Cases*, 94–97; and Wheaton, §§ 228–241) for an apparent exception to this rule.

The Prussian Government supported the claim of Wheaton's landlord to detain his furniture for alleged damages on the ground that "the lessor is entitled, as a security for the rent and other demands arising under the contract, to the rights of a *Pfandgläubinger* (a creditor whose rights are secured by hypothecation), upon the goods brought by the tenant upon the premises and there remaining at the expiration of the lease." Prussian Civil Code.

In other words, "the Prussian Government decided that the general exemption of the personal property of a foreign minister from the local jurisdiction did not extend to the case in question, where, it was contended, the right of detention was created by the contract itself and by the effect given to it by the local law." The United States Minister maintained that this position was in violation of diplomatic immunities. Those authorities who discuss the case appear to agree with Wheaton.

[44] In Austria there is a special court for this purpose, but submission to its jurisdiction is voluntary. Neumann, *Éléments*, § 62, p. 260. For Minister Jay's experiences before this court (1875), see 4 Moore, *Digest*, § 661.

[45] This exemption includes direct personal taxes, such as the capitation or poll tax; special taxes like those on income and capital (unless the minister is engaged in commerce); sumptuary taxes like those on doors and windows; those for military purposes, quartering troops, etc.

Otherwise, he enjoys no exemption from taxes or duties as of right. By courtesy, however, most, if not all, nations permit the entry free of duty of goods intended for his private use."[46]

277. **Other Privileges.** — Other privileges of public ministers are the right of private worship (which is no longer of great importance in this age of toleration); the right, according to their rank, to certain ceremonial honors and marks of respect;[47] a very limited and purely voluntary disciplinary jurisdiction over members of their suites or official families;[48] and, if permitted by their home Governments, the right of performing certain civil functions, such as the issuance of passports to fellow nationals, the authentication of certain documents like wills, contracts, etc., and the performance of the marriage ceremony.[49]

It does not necessarily include such indirect taxes as the excise, rates or assessments for local purposes from which he derives a benefit, inheritance taxes, customs dues, stamp and registry duties, tolls, etc. Nor does the immunity include taxes on realty. Even the residence of the minister is not necessarily exempt from the land tax. In respect to indirect taxes and the tax on his residence, the principles of reciprocity or courtesy are usually applied.

For the practice of the United States, see 4 Moore, *Digest*, §§ 667–669. Art. 11 of the "Rules on Diplomatic Immunities" adopted by the Institute of Int. Law in 1895 declares: "The foreign public minister, the functionaries officially attached to his mission, and the members of their families living with them, are dispensed from paying: (1) direct personal imposts and sumptuary taxes; (2) general imposts upon wealth, whether upon capital or upon income; (3) war taxes; (4) customs dues in respect to objects for personal use. Each Government may indicate the evidence required for these exemptions from taxation." 14 *Annuaire*, 243.

[46] Hall (6th ed.), 183.

[47] See especially 2 P.-Fodéré, *Cours*, pp. 273 ff.; *cf. Ibid., Traité*, Nos. 1287 ff., 1496–1501.

[48] See Bonfils, Nos. 726–729; 3 Calvo, §§ 1540–1549; Heffter, § 216; 2 P.-Fodéré, *Cours*, 254 ff.; 3 *Ibid., Traité*, Nos. 1472–1490; 1 Rivier, 504 f.

But the old idea of the right of criminal and civil jurisdiction over members of the suite, formerly claimed and sometimes exercised, has disappeared from the doctrine as well as the practice of the Law of Nations, excepting in some parts of the Orient. See *infra*, § 291.

[49] On *Diplomatic and Consular Marriages*, see Hall (6th ed.), 183-184 and note on p. 184; 3 Lawrence, *Commentaire sur Wheaton*, 357 ff.; * 2 Moore, *Digest*, §§ 224–239; Odier, *Des privileges des agents diplomatiques*, 328–386; and Westlake, *Private Int. Law* (4th ed., 1905), §§ 27–30.

The marriage of two fellow nationals of the diplomatic agent celebrated at the embassy is generally valid, if performed in conformity with the law of their State; but no State is under any international obligation to recognize such marriages. And the State in which the ceremony is solemnized may refuse to recognize their validity, unless performed in accordance with its laws. There appears to be no

278. **The Freedom of the Hotel or Immunity of Domicile.** — It is generally agreed that the hotel or residence[50] of the foreign minister is protected from forcible entry or invasion by his diplomatic inviolability and immunities. But this freedom is not absolute. The embassy must not harbor criminals or refugees from justice,[51] and no violation of territorial sovereignty should be permitted. The minister should surrender those accused of crime and, if necessary, even permit the premises to be searched. In case of persistent refusal, the legation may be surrounded with guards, and if extremely urgent, forcible entry may be made.[52]

general rule on this interesting subject, and the whole matter remains in great confusion.

In its instructions to consular and diplomatic agents, the United States Government has always emphasized the importance of observing the law of the country in which the marriage ceremony takes place. 2 Moore, § 237. But this rule does "not apply to non-Christian or semi-civilized countries where consular courts are established." 2 *Ibid.*, § 238.

It would seem that mixed marriages or the marriage of a national with a foreigner in the embassy would not, as a rule, be upheld. Thus, mixed marriages solemnized at foreign embassies in Paris have been repeatedly declared void by the French Tribunals; and the marriage between an Austrian and an English woman celebrated at the British embassy in Vienna was annulled by the Supreme Court of Austria in 1880. For the latter case, see Von Bar (Gillespie's trans.), 493 n. For the French case of *Meffray and Mudge*, see Odier, *op. cit.*, 331 ff.

[50] This includes his stable, carriages, etc.

[51] The old "freedom of the quarter" has disappeared, except in some parts of the Orient. On the so-called *Right of Asylum*, see *supra*, §§ 225 ff.

But the protection of the embassy may well be extended from motives of humanity to refugees from mob violence or a criminal conspiracy.

[52] In the case of *Gallatin's coachman* (1827), who had committed an assault outside the embassy, the English Government claimed the right of arresting him within the stable of the minister. It admitted, however, that as a matter of courtesy, the convenience of the minister should have been consulted as to the time and manner of making the arrest. 4 Moore, pp. 656 f.

This case is mentioned by nearly all the authorities, who generally cite it as an example of the "English practice," which they consider exceptional. It certainly does not seem to have been a case of extreme urgency.

In 1865 a Russian subject, having wounded one of the attaches of the Russian embassy at Paris, was removed by police officials who had been called upon for aid. Upon his being imprisoned and indicted, the Russian ambassador requested his extradition on the ground that the hotel of the embassy was extraterritorial; but the French Government refused this request and proceeded with the trial. 3 Calvo, § 1505.

A Chinese refugee was induced to enter the house of the Chinese Legation in London (in 1896), and kept under arrest there with the purpose of sending him back to China for trial. But the English Government properly insisted upon his release. 1 Oppenheim, § 390.

279. **The Family and Suite of the Envoy.** — To a greater or less degree, these immunities are shared by the family and suite of the envoy.[53] His retinue or suite include:

(1) The members of his family, as wife, children, and other near relatives living under his roof.

(2) His official suite and their families, such as Councillors, Naval and Military Attachés, Secretaries of Legation,[54] the Chancellor of the Legation, various assistants, clerks, interpreters, the chaplain, doctor, official legal adviser, and the like.

(3) Couriers or bearers of dispatches.

(4) Domestics like private secretaries, tutors, and servants[55] such as cooks, coachmen, etc.

280. **Extent of these Immunities.** — It is generally agreed that the various members of the family and of the official suite of the envoy, together with their families, enjoy the same inviolability and the same immunities that he himself does. Children born to them during their mission are regarded as having been born on the territory of the home State. These privileges cannot be waived[56] without the consent of the home Government. They are also shared by couriers or dispatch bearers of the legation (who also share in the right of innocent passage through third

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[53] It is customary to furnish to the local authorities a list of the members of the family and domestics, but, according to Taylor (p. 346 n.), this custom is more honored in the breach than the observance. The best evidence of diplomatic character is a certificate of the Secretary of State. *In re Baiz* (1908), 135 U. S. 403, and Scott, 196; and *U. S.* v. *Liddle*, 2 Wash. C. C. 205.

[54] "The wife of a secretary of a foreign legation in this country is, while with him in his official capacity, subject, in respect to her personal estate, to the laws of the country he represents." Secretary Frelinghuysen to Mr. Lawrence (1883). Cited in 4 Moore, *Digest*, § 652.

[55] These do not include workmen occasionally employed on the premises. To entitle one to immunity, the service must be real, and not colorable. *Triquet* v. *Bath*, 3 Burrows, 1478, and Scott, 6; *Heathfield* v. *Chilton*, 4 Burrows, 2015, and Scott, 189; and *Sarmiento's Case*, in 4 Moore, p. 654.

The immunity does not extend to matters unconnected with the service. In *Novello* v. *Toogood*, 1 B. and C. 554, a chorister of the Portuguese ambassador was held liable for poor rates on a house in which he lived and let lodgings. This appears to have been on the ground that he was carrying on the business of lodging house keeper; for, in a later case, it was held that an attaché of the Portuguese embassy was not liable for parochial rates on a house which had been sublet to him. *Parkinson* v. *Potter* (1885), L. R. 16 Q. B. Div. 152, and Scott, 192.

[56] This is at least true in respect to those immunities belonging to any member of his *official* family or suite.

States) during the performance of their duties. The dispatches they bear are also exempt from search and seizure.

It is also customary to grant exemption from civil and criminal jurisdiction to all persons in the private service of the envoy or of members of his legation, provided such persons are not nationals of the receiving State. But these privileges may be waived at discretion, and mere servants or domestics cannot claim exemption from taxes, immunity of domicile, or freedom from arrest for crime committed outside the residence of their employers. In case of arrest, they should, however, be released if the envoy refuses to waive their immunity from criminal jurisdiction.[57]

Mere visitors and hangers-on of the embassy do not enjoy diplomatic privileges and immunities.[58] They do not necessarily extend to consuls as such, public or secret political agents, military or naval officers, or mere commissioners not clothed with a diplomatic character. But they do extend to the judges of the Hague Tribunal or Court of Arbitration and of the International Prize Court,[59] members of official International Congresses and Conferences, and, in general, to all agents clothed with a diplomatic or representative character. It should be added that if a State consents to receive one of its own nationals in a diplomatic capacity, it should extend to him all privileges and immunities belonging to his mission, unless it has made their abandonment a condition of his reception.[60]

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[57] In this case they should be sent home for trial. Nationals of the receiving State should be handed over to the local authorities.

There is a considerable diversity both in the doctrine and practice respecting immunities of domestics or non-official members of the diplomatic suite. The Italian school of publicists deny immunity from all criminal as well as civil jurisdiction. Others make a distinction between these two kinds of jurisdiction. Some authorities distinguish between offenses committed outside and inside the embassy; others between nationals and foreigners.

Anglo-American law and practice, which grant immunity from suit to domestics of public ministers, seem more liberal than necessary, for the modern tendency is to restrict the diplomatic privileges and immunities of mere servants or non-official members of the legation, and this tendency is in the right direction. These extensive immunities are no longer necessary (if, indeed, they ever were) to the freedom of the diplomatic agent. At any rate, there appears to be no good reason why domestics should enjoy immunity from civil jurisdiction.

[58] The case of *Don Pantaleon Sa* (1653) is the one usually cited in this connection. But it is not clear whether this brother of the Portuguese ambassador, who was executed by Cromwell for murder committed under circumstances of peculiar atrocity, was a mere visitor or an actual member of the Portuguese embassy. It appears that he had received a promise from his sovereign that he would be appointed to succeed his brother (whose recall was momentarily expected) as ambassador to England.

As Lawrence (*Principles* (3d ed.), p. 277) says: "If he is to be regarded as a member of his brother's suite, all we can say is that International Law has developed since his time and would not now permit a trial and execution under similar circumstances by the authorities of the State where the crime was committed. But if he was simply a visitor at the embassy, he would not be protected by diplomatic immunity to-day any more than he was two hundred and forty years ago."

For the case of *Don Pantaleon Sa*, see Snow, *Cases*, 86; and 2 Ward, *Hist. of the Law of Nations*, 535–546.

II. SOVEREIGNS AND HEADS OF STATE

281. **Immunities of Sovereigns.** — Sovereigns and Heads of State traveling or residing abroad enjoy, in time of peace, inviolability and absolute immunity from criminal and police jurisdiction.[61] They are also exempt from civil process[62] except in the following cases:

(1) In respect to any real property which they may possess as private individuals in the foreign State. (2) Respecting civil actions based upon the capacity of the State or sovereign as heir or legatee in an open succession upon foreign territory. (3) In case the State or foreign sovereign voluntarily accepts the local

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[59] See *infra*, §§ 314, 528.

[60] English judges hold that even a British subject may enjoy the immunities of a diplomatic agent. *Macartney* v. *Garbutt*, L. R. 2 Q. B. Div. 368. See Art. 15 of the Rules adopted by the Institute of Int. Law to the contrary. 14 *Annuaire*, 244.

[61] Unless they travel *incognito*. But this is no real exception, inasmuch as they may, at any time, reveal their identity and thus claim the privileges and immunities of sovereigns.

Another apparent exception is where a sovereign enters the military service of another sovereign. In this case, his immunities are partly suspended. Where a person is subject in one country and sovereign in another, he is subject to the laws of the former in his private capacity.

If the safety of the State requires it, as in case of conspiracy, they may be sent out of the country. This is rather an application of the supreme law of necessity than an exception to complete immunity.

Presidents of Republics, when traveling in a representative capacity, have a right to the same privileges and immunities as Monarchical Sovereigns.

[62] See *De Haber* v. *Queen of Portugal* (1851), 17 Q. B. 196, and Scott, 180; and *Mighill* v. *Sultan of Johore* (1894), L. R. 1 Q. B. 149. See also 1 Calvo, §§ 1462–1473; 2 Phillimore, § 109; and 2 Moore, *Digest*, § 250.

territorial jurisdiction.[63] (4) For damages resulting from a delinquency committed by a sovereign upon foreign territory, unless such injuries are due to acts of sovereignty.[64]

Foreign sovereigns or Heads of State also enjoy certain fiscal immunities, such as freedom from direct personal taxes, customs dues, etc.; but they are not necessarily exempt from indirect taxes other than customs dues, or from taxes on realty.

These immunities extend to his residence, family, and suite; but, contrary to the older practice, the sovereign[65] has no criminal jurisdiction over members of his suite on foreign territory. Nor may he afford asylum to criminals or refugees from justice. Sovereigns who have abdicated or been deposed do not have a right to the privileges and immunities of reigning sovereigns, though they may enjoy them as a matter of courtesy.

282. **A State not Liable to Suit or Judicial Process.** — That a State cannot be sued without its own consent has long been a fundamental principle of the Law of Nations, as it is of the Constitutional Law of the United States.[66]

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[63] For important English and American cases, see Scott, 170–186; Snow, 72–82; and 2 Phillimore, § 113 A.

[64] For these exceptions, see the Rules adopted by the Institute of Int. Law in 1891. 11 *Annuaire*, 436.

The fourth exception is very doubtful. It appears to be a principle of French jurisprudence, but it would certainly be rejected in England, where it has been held that a foreign sovereign was not liable in damages for a breach of promise of marriage which he had made while living in England under an assumed name. See *Sultan of Johore*, L. R. 1 Q. B. 149, and 2 Moore, *Digest*, § 250.

[65] The older practice is illustrated by the famous case of *Queen Christina of Sweden* (1657), 3 Calvo § 1477, and Walker, *Manual*, 70. In 1873 the Shah of Persia condemned a member of the suite to death in London, but the British Government refused to permit the execution.

[66] See Amend. XI of the Constitution of the United States.

To the principle laid down in the text, there seems to be an exception, viz. where the State owns or inherits real property or conducts a business enterprise in the territory of another State. On the much-discussed *Zappa Affair*, see especially 6 Calvo, §§ 286–299; Despagnet, No. 186; and 1 Westlake, 241. For references on the *Zappa Affair*, see Bonfils (5th ed.), p. 157.

On the general subject of this section, see especially Despagnet, Nos. 257 f.; Féraud-Giraud, *États et souverains . . . devant les tribunaux étrangers* (2 vols., 1895); Kohler, Laband, Meili, etc., in 4 *Zeitschrift* (1910), 309 ff.; Imbert, *Les emprunts d'états étrangers* (1905); Meili, *Der Staatsbankerott* (1895); Moulin, *La doctrine de Drago* (1908); Piot, *Des régles de competence applicable aux États et aux souverains étrangers* (1887); De Paepe, *Études sur la competence civils des états étrangers* (1894); Wuarin, *Essai sur les emprunts d'états* (1907). For further references, see Bibliographies in Bonfils, No. 632, Moulin, etc.

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CHAPTER XVIII

RIGHTS AND DUTIES OF CONSULS AND CONSULAR JURISDICTION IN THE ORIENT

283. **Definition.** — Consuls are official agents sent by a State to foreign ports and cities, mainly for the purpose of watching over and promoting the commercial and industrial interests of the appointing State and its citizens or subjects, and of protecting its nationals traveling or residing in these regions.[1]

284. **Classification.** — With reference to their character, modern consuls are of two kinds: (1) *Consuls missi*, or professional consuls (*consuls de carrière*), who are not permitted to engage in any other business or profession. They are real public officials or functionaries of the sending State and enjoy full consular privileges and immunities. (2) *Consuls electi*,[2] or commercial consuls, who are chosen by the appointing government, either from its own citizens engaged in business in the city or country in which they are permitted to exercise their functions, or from among the nationals of a foreign State (usually of the country in which they serve). They are of distinctly inferior competence and status, and do not enjoy full consular privileges and immunities.[3]

With respect to rank, consuls are usually divided into four classes: (1) Consuls-general who exercise supervision or control over several consular districts or one large consular district. (2) Consuls for smaller districts or certain towns or ports. (3) Vice-consuls with consular character. (4) Consular agents with consular character.[4]

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[1] On the *Mediæval Origin of the Consulate*, see *supra*, § 51, and note on page 52, for references.

[2] This term is now a misnomer, since this class of consuls is also appointed by the sending State. They were formerly elected by foreign merchants themselves.

[3] Some States (*e.g.* France, Great Britain, and the United States) do not, as a rule, appoint merchant or business consuls.

The United States has always preferred to appoint native American citizens, if properly qualified candidates for the position could be found. "No person who is not an American citizen shall be appointed hereafter in any consulate-general or consulate to any clerical position the salary of which is one thousand dollars a year or more." Act of April 5, 1906, sec. 5. See 5 Moore, *Digest*, § 697, p. 12. This Act also abolished the grade of commercial agent.

Consuls are, as a rule, placed under the direction of the Minister of Foreign Affairs or Secretary of State, with whom they correspond and to whom they send their reports; but they are also under the general supervision of the diplomatic agent or public minister accredited to the Government of the country in which they are located.

285. **The Appointment of Consuls.** — Every State is free to appoint such consuls, whether of its own or of a foreign nationality, as it deems qualified; but no State is legally bound either to admit them generally[5] or to permit the exercise of consular functions in a particular place or locality.

The consul receives from his home Government letters patent (*lettres de provision*) or a commission which is transmitted through diplomatic channels to the Minister of Foreign Affairs of the country in which he is to serve. If he prove acceptable, he is furnished with an *exequatur*,[6] or authorization to exercise consular functions by the foreign Government. The exequatur may be refused[7] or it may be withdrawn[8] without assigning any reason. In serious cases the receiving Government may ask for a consul's recall, though such a request need not be entertained by the appointing Government, unless it is satisfied that it is well grounded. In extreme cases a consul may be summarily dismissed.

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[4] 1 Oppenheim, § 422. The British Consular Service has six ranks. *Ibid.*, p. 468.

"By the Act of April 5, 1906, for the reorganization of the United States consular service, Consuls-general are divided into seven classes, according to the salary, and consuls into nine classes. . . ." See 5 Moore, p. 8. For this Act and the regulations governing consular appointments and promotions in the United States, see Supplement to 1 *A. J.* (1907), 308–316.

"Consuls-general of the United States have usually a supervising jurisdiction over the consuls in the country to which they are accredited. . . . Consuls-general and consuls are appointed by the President and confirmed by the Senate. Vice and deputy consuls-general are recommended by their chiefs, and are commissioned by the Secretary of State. . . . Consular agents are nominated by the consuls, are commissioned by the Secretary of State, and act as the representative of their chief at the commercial places within their district. . . ." Foster, *The Practice of Diplomacy*, 218.

[5] By refusing to appoint or receive consuls, a State would, of course, practically lose many of the advantages of membership in the international community.

[6] "An *exequatur* usually consists in a letter patent signed by the sovereign, and countersigned by the Minister of Foreign Affairs; but it is not necessarily conferred in so formal a manner; in Russia and Denmark the consul merely receives notice that he is recognized, and in Austria his commission is indorsed with the word 'exequatur' and impressed with the imperial seal." Hall (6th ed.), 311.

286. **Functions of Consuls.** — One of the leading authorities[9] on this subject has classified or summarized the duties or functions of consuls under the following heads:

(1) As commercial agents of their Government and as protectors of the commerce and navigation of their nationals.[10]

(2) As agents for their Government for securing political information and as overseers of the execution of treaties.[11]

(3) As agents for the administration of the marine of the state, and as agents charged with the police of the merchant marine.[12]

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[7] A State may refuse to receive a consul on personal or political grounds. No reasons for refusal need be given.

The case usually cited in this connection is that of Major *Haggerty*, a naturalized Irish-American, who was known to have been connected with Fenian plots. England properly refused to grant him an exequatur in 1869.

[8] Mérignhac (II, 327) justly observes: "This measure should only be taken after ripe reflection, for it is more serious than the refusal to grant an exequatur."

For cases of *Refusal*, *Revocation*, *Dismissal* and *Recall*, see 1 Calvo, §§ 1381; 1383–1384, 1391; Hall (6th ed.), 311 and 312 n.; * 5 Moore, *Digest*, §§ 700–701; and 4 P.-Fodéré, Nos. 2063–2064.

[9] Pradier-Fodéré, in 4 *Traité*, Nos. 2070–2096. On the *Duties or Functions of Consuls*, see also Bonfils, Nos. 762–771; * Foster, *Practice of Diplomacy*, 223–237; * Hall, *Foreign Jurisdiction*, etc., 73–101; * 5 Moore, *Digest*, §§ 717–731; 1 Oppenheim, §§ 429–433; 2 Phillimore, §§ 257–260; * Stowell, *Le consul* (1909), 15–136, 225–297; *Ibid.*, *Consular Cases and Opinions* (see index); *Consular Regulations of the United States* (1896); Ullmann (2d ed.), § 61.

[10] They furnish all sorts of information relating to municipal laws, tariffs, trade conditions, industries, navigation, agriculture, finances, institutions, etc., to their Government or fellow nationals. Much of this information, which is often extremely valuable, is embodied in consular reports.

They are also expected to lend their good offices in securing for their fellow citizens fair treatment and protection from injustice; and in maintaining for them all the privileges and advantages to which they are entitled through municipal law, international usage, or treaties, more particularly the most-favored nation clause.

[11] Their rôle as political agents is entirely secondary and passive, if not exceptional. The function of overseeing the execution of treaties of commerce and navigation is, however, of prime importance.

[12] They control and legalize "ship's papers," inspect vessels, and certify invoices of their cargoes, settle disputes between master and crew or passengers, assist sailors in distress, secure their arrest or extradition for desertion, mutiny, or other crimes.

(4) As agents of administration in general.[13]

(5) As officers of the home State for the performance of civil functions.[14]

(6) As officials acting in a ministerial capacity.[15]

(7) As protectors and, under certain circumstances, guardians of the interests of their fellow nationals.[16]

(8) As arbitrators or judges exercising a very limited and purely voluntary jurisdiction over fellow nationals.[17]

(9) As sanitary police agents and administrators.[18]

The rights and duties of consuls are determined, in any particular case, by treaties, by custom or international usage, by such conditions as may be laid down in the exequatur, and by the consular laws and regulations of the appointing State. But consuls may not discharge functions at variance with the law of the receiving State.[19] The duties of American consuls are rendered particularly onerous by reason of our tariff and immigration laws, which impose upon them many functions in connection with their execution.

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[13] This includes a wide range of functions, such as the issuance and visé of passports to fellow nationals, the authentication and legalization of documents, the granting of certificates of various sorts, the registry of births, deaths, and marriages, etc.

[14] For example, the consular right to celebrate marriages, as to which the practice varies greatly. It is, in general, limited to marital unions between fellow nationals. Great Britain permits it where one of the parties is a British subject. The United States does not authorize its consuls to solemnize marriages.

On *Consular Marriages*, see especially: Hall, *Foreign Jurisdiction*, etc., 85–101; 1 Halleck (3d ed.), 381 f. and notes; 2 Moore, *Digest*, § 240; 4 P.-Fodéré, No. 2079; Stowell, *Le consul* (1909), 34–51; *Ibid.*, *Consular Cases* (see compendium and index); Westlake, *Private Int. Law* (4th ed., 1905), § 27.

[15] Such are notarial acts of various sorts, like the attestation of contracts, the attestation and reception of wills, the reception of moneys and goods deposited by fellow nationals, the examination of witnesses and administration of oaths, etc.

[16] Most consular conventions give them the right of appealing to the local authorities to secure this protection, which may even be extended to nationals of other States who are under their protection (protégés). Generally speaking, it is the duty of consuls to render such aid to their fellow nationals as is necessary to enable them to earn their living or return to their own country; but this obligation is a moral rather than a legal one, and great care and caution must be used in its exercise.

It is also customary for consuls to intervene in the administration of successions and see that justice is done in case of the death of fellow nationals, and they may have to act as guardians in behalf of minors, idiots, etc., and to administer estates.

[17] Except in the case of crews they have no contentious or compulsory jurisdiction in so-called Christian countries.

It is a custom based on treaties and usage for consuls to exercise a disciplinary jurisdiction (though not to the exclusion of local jurisdiction) over such offenses committed by the crews of vessels of their own nationality as do not disturb the peace or dignity of the port.

[18] Their rôle in this capacity is mainly that of furnishing their Government with information relating to epidemics, the state of public health in the cities or ports where they are located, the measures taken to prevent or check the spread of disease, etc. They also inspect vessels bound for a port of their own country for this purpose.

287. **Consular Privileges and Immunities.** — Though consuls do not, as a rule, exercise diplomatic functions, they nevertheless enjoy certain privileges and immunities; but these are, for the most part, derived from treaties, local usage, or general custom based upon considerations of respect or reciprocity.

288. **Those forming Part of International Law.** — There are, however, a few rules which may be said to form a part of International Law proper. It is generally agreed that professional consuls are under the special protection of International Law, and that they are entitled to a certain degree of respect and protection[20] or personal immunity, though they are not inviolable.[21] It is also agreed that the official archives[22] and correspondence of the consulate are inviolable; and that consuls are permitted to place above the outside entrance of the consulate the arms of their country, and to display the flag[23] of their country on public

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[19] Opinion of Att.-Gen. Cushing in *Opinions of Attorney's-General*, 100 and 470, or Stowell, *Consular Cases and Opinions*, 570 and 582.

[20] States are prone to resent any affront offered to their consuls or consulates, such as an attack by a mob or insult to the consular flag. In the *New Orleans Affair* (see *supra*, § 154), Webster admitted liability for the attack on the Spanish consulate.

For the numerous cases illustrative of the protection due to consular officers and archives, see 5 Moore, *Digest*, §§ 704-705. For the famous *Pritchard Affair* between France and England, which almost resulted in war, see 1 Calvo, § 1392 or 2 Phillimore, § 247.

[21] But the personal inviolability of consuls is usually secured by treaty. To the same effect is Art. 7 of the "Regulations relating to Immunities of Consuls," adopted by the *Institute of International Law* in 1896. 15 *Annuaire*, 273. "In no case may consuls be arrested or detained, except for grave infractions of the law." For an English translation of these "Regulations," see Stowell, *Consular Cases*, 1–5.

[22] This immunity naturally carries with it the inviolability of the consulate or of that portion of the consul's residence in which the archives are contained, but it does not extend to the private papers or personal effects of the consul.

It goes without saying that the consulate should not be used as an asylum for refugees or criminals. These should be surrendered upon request by the local authorities.

[23] Art. 14 of the "Regulations" adopted by the *Institute* (1896). But the Consular Regulations of the United States (1896) state that "permission to display the national flag is not a matter of right, though it is usually accorded." § 73.

occasions unless they reside in a city where their Government is represented by a diplomatic mission.

The measure of consular privileges and immunities in International Law would seem to be the amount or degree necessary for the proper performance of consular duties. Thus, a consul, not a citizen of a foreign State, may claim exemption from service on juries and in the militia, and no troops should be quartered upon the consulate or consular residence.

Such are the consular privileges and immunities which may be said to constitute a part of International Law. In addition, they enjoy considerable privileges which are based on treaties, reciprocity, the most-favored-nation clause, or local usage.[24]

289. **Privileges and Immunities Based on Treaties and Usage.** — One of the most general consular immunities based on treaty or reciprocity is that of exemption from direct personal contributions, such as the poll tax, and from taxes on income, furniture, doors and windows,[25] etc.; but they are never exempt from taxes on realty, or on business in which they are themselves engaged.[26]

The student should read the whole of Article V on "The Privileges and Powers of Consular Offices under the Law of Nations."

[24] "Generally, a consul may claim for himself and his office not only such rights and privileges as have been conceded by treaty, but also such as have the sanction of custom and local laws, and have been enjoyed by his predecessors or by consuls of other nations, unless a formal notice has been given that they will not be extended to him." *Consular Regulations of the United States* (1896), § 72, p. 27.

[25] In some countries exemption from customs dues is granted as a matter of courtesy. "Article 476 of the Customs Regulations of the United States provides for free entry in the United States 'of articles sent by a foreign government, for its use, to an agent in this country, on application through the Department of State.'" 5 Moore *Digest*, § 716.

Art. 13 of the "Regulations on Immunities of Consuls" adopted by the Institute of International Law (1896) declares: "Consuls are exempt from the payment of: (1) direct personal taxes, and sumptuary taxes; (2) general taxes upon their fortune, whether upon the capital or income; (3) imposts of war.

[26] "With reference to a complaint that the consul of the Elector of Hesse at New York had been enrolled in a military company, and had been fined by a court-martial for non-attendance upon the company's parades, the Department of State said that the case was one that belonged primarily to the courts of law, which had, when resorted to in such cases, always decided, according to the principles laid down by the Law of Nations, and embodied in treaties, that 'all persons recognized in the consular character by the President's exequatur, *who are not citizens of the United States*, are exempted from all public service, and from all taxes, imposts, and contributions except such as they may have to pay on their property, or in consequence of their engaging in commercial pursuits, they remaining in all cases amenable to the

Another common consular immunity found in treaties is that of freedom from the obligation of serving as witness or giving testimony in court except through deposition.[27]

Nearly all authorities agree that consuls, whether engaged in trade or not, are amenable to the local courts in civil as well as criminal matters;[28] but it is also generally held they should not be "arrested or detained except for grave infractions of the law."[29]

290. **Termination of Consular Functions.** — The consular office terminates through death, recall or dismissal, revocation of exequatur, or war.[30] It is a principle universally recognized that a change in the headship of the appointing or receiving State does not terminate the functions of a consul. Neither a new commission nor exequatur are necessary.[31]

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laws of the country.'" Secretary Forsyth to Mr. Faber (1840), in 5 Moore, *Digest*, § 715.

This passage throws light upon the practice of the United States; but it cannot be successfully maintained that the exemption from taxes is a principle of the Law of Nations, for it is not universally recognized, nor is it essential to freedom in the performance of consular duties.

[27] Secretary Marcy contended (in 1854) that the provision in the Federal Constitution granting to an accused person the right of compulsory process to procure the presence of witnesses in his favor, prevailed over a treaty with France which exempted consuls from the obligation of appearing in court and giving testimony. This contention "was not acquiesced in by the French Government, which required their flag, when raised to the mastheads of certain of their men-of-war at San Francisco, to be saluted as a reparation for the alleged indignity to their consul." 5 Moore, § 714. See also Snow, *Cases*, 99; 1 Wharton, *Digest*, 665; and *In re Dillon* (1854), 7 Sawy., 5–61, or Stowell, *Consular Cases*, 139.

All reasonable doubt on this subject has been removed (if any ever existed) by the decisions in *Baiz* v. *Malo* (1899), 58 N. Y. Supp. 806; and *U. S.* v. *Trumbell* (1891), 48 Fed. Rep. 94. For summary, see Stowell, 51 and 418.

[28] The principle that consuls are not entitled to the immunities of public ministers from civil and criminal jurisdiction appears to have been first laid down judicially in *Barbuit's Case* (1737), Forrester's Cases Temp. Lord Talbot, 281, and Stowell, *Consular Cases*, 52. It has been repeatedly affirmed. For numerous other cases, see 5 Moore, *Digest*, §§ 711–712; and Stowell (see compendium, pp. 758–760, and index, 799). A particularly interesting case is that of *Com.* v. *Kosloff* (1816), 5 S. and R. 545; 5 Moore, *Digest*, § 712; and Stowell, 112.

[29] In the United States the Federal Courts have exclusive jurisdiction over consuls. 5 Moore, § 713. Art. 7 of the Regulations of the Institute, cited above.

[30] It is doubtful whether the functions of a consul terminate when his district is annexed, ceded to, or conquered by another State. Oppenheim (I, § 437) thinks the answer should be in the affirmative.

[31] 1 Oppenheim, § 438.

291. **Consular Jurisdiction in Africa and the Orient.** — In Mohammedan countries and in the Orient,[32] the consuls have not only retained their original jurisdiction [33] over their own countrymen, but they also enjoy most of the diplomatic privileges and immunities. These include inviolability, certain marks of honor and respect, immunity from civil and criminal jurisdiction, and other miscellaneous rights and privileges.[34]

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For further references, see Bonfils (5th ed.), pp. 452 f., and p. 460 for references on the Mixed Tribunals of Egypt — a subject of special interest.

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[32] Except in Japan, where the extraterritorial privileges and immunities of consuls were abolished in 1899.

[33] This extraterritorial jurisdiction seems to be based upon the right of protection — a right which extends even to natives who are taken under the protection (*protégés*) of the foreign diplomatic or consular legations. It is derived from treaties or capitulations (see 1 Twiss, ch. 14), and is reënforced by custom or prescription.

[34] Since this highly complicated and technical subject forms no part of International Law proper, but is based mainly upon treaties, it has not been deemed necessary to enter upon a detailed discussion of it in the text.

Consuls. — 11, 12, 13, and 15 *Annuaire*, 348 ff., 275 ff., 179 ff., and 273 ff., respectively; Bluntschli, Arts. 244–275; Bodin, *Les immunités consulaires* (1899); * Bonfils (Fauchille), Nos. 733–775; Bulmerincq, in 3 Holtzendorff, 687–797; *Ibid.*, in 1 Marquardsen, §§ 70, 72, 74, 77, 81; 3 Calvo, §§ 1368–1430; De Clercq et de Vallet, *Guide pratique des consulats* in 2 vols. (5th ed., 1898); Davis (3d ed.), 211–218; Despagnet, Nos. 352–368; * Engelhardt, in 20, 21, 22, and 25 *R. D. I.*, 505 ff., 588 ff., 336 ff., and 132 ff., respectively; Féraud-Giraud, *États, souverains*, etc. (1895); Field, *Code*, Arts. 159–185; 2 Fiore, Nos. 1176–1187; * Foster, *Practice of Diplomacy*, ch. 11; Funck-Brentano et Sorel, *Précis*, ch. 6; * Hall, *Foreign Jurisdiction*, etc., 73–101; *Ibid.*, *Int. Law* (6th ed.), 309–315; 1 Halleck (Baker's 3d ed.), ch. 11; Heffter, §§ 244–248 and Geffcken's notes; Hübler, *Die Magistraturen*, §§ 12–18; Jones, *Consular Service of the United States* (1906); Lawrence (3d ed.), § 148; *Ibid.* (4th ed.), § 131; 4 Lawrence, *Commentaire*, 1–304; Lehr, *Manuel des agents diplomatiques et consulaires* (1888); Lisboa, *Les functions diplomatiques* (1908), ch. 5; Liszt, § 15; * Koenig, *Handbuch des deutschen Konsularwesens* (6th ed., 1902); 1 Ch. de Martens, *Guide diplomatique* (1866), §§ 68–78; 2 F. de Martens, §§ 18–23; Monnet, *Manuel diplomatique et consulaire* (1905); * 5 Moore, *Digest*, ch. 16; 2 Nys, 394–403; * 1 Oppenheim, §§ 418–438; * 2 Phillimore, §§ 243–271; * 1 Piédelièvre, Nos. 567–616; Pillaut, *Manuel de droit consulaire* (1910); Pomeroy, §§ 370–385; * 4 P.-Fodéré, Nos. 2034–2146; * 1 Rivier, 519–542; Salles, *L'institution des consulats* (1898); Schuyler, "Our Consular System," in *American Diplomacy;* Scott, *Cases*, 234–251; * Stowell, *Le consul* (1909); * *Ibid.*, *Consular Cases and Opinions* (1909); Taylor, §§ 325–330; 1 Twiss, § 223; * Ullmann (2d ed.), §§ 54–62; Walpole, *Foreign Relations*, ch. 5; 1 Westlake, 269, 277–278; 1 Wharton, *Digest*, ch. 5; Wheaton (Atlay's ed.), §§ 110, 216, 249; *Ibid.* (Dana's ed.), notes, 68 and 135; * Wilson, ch. 6; Woolsey, §§ 99–100.

See also *Consular Regulations of the United States* (1896); and *General Instructions* to Her Majesty's Consular Officers (1893).

For further references see the bibliographies in Bonfils, and Stowell.

CHAPTER XIX

INTERNATIONAL CONGRESSES AND CONFERENCES

292. **Purpose and Character of International Congresses and Conferences.** — The enormous increase in the number, variety, and importance of International Congresses and Conferences[1] since the middle of the nineteenth century has been discussed in the Introduction.[2] In this connection it will merely be necessary to point out a few of the rules governing the organization and procedure of these bodies.

They usually consist[3] of delegates or representatives of a number of Sovereign States clothed with diplomatic privileges and immunities, and bearing full powers and instructions, who meet for the purpose of discussing matters of common interest, or for that of negotiating agreements on certain subjects. The most important are those which meet to settle great political questions, like the Congress of Vienna in 1815 or that of Berlin in 1878, to discuss and decide matters of common interest, like the various Pan-American Conferences, or to negotiate great Lawmaking Treaties or World Agreements like the Hague Peace Conferences of 1899 and 1907.[4]

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[1] These terms appear to be used interchangeably at the present time. Only official Congresses and Conferences are dealt with in this chapter.

[2] See *supra*, § 79.

[3] Heads of States now seldom or never attend these Conferences in person. The States represented are usually, though not necessarily, fully sovereign.

[4] The number and importance of Lawmaking and Peace Conferences has greatly increased within recent years. The first important Lawmaking Congress was that of Vienna in 1815, but its work as an International Legislature was entirely secondary. The same is true of the Congress of Paris in 1856. But after 1870 we have a series of Lawmaking Conferences and Congresses, beginning with the Brussels Conference of 1874 (including the Hague Peace Conferences), which do not have their origin in the need of a political settlement after a great war or series of wars, but which are called in times of peace for the purpose of preventing or regulating war.

The Great Powers have, in times past, undertaken to speak for the whole of Europe or the world, more particularly in the solution of political questions; but the present tendency appears to be toward a more general inclusion of the smaller or weaker Powers, even of Asia and Latin America.[5]

293. **Rules of Organization and Procedure.** — There are no fixed rules for the organization and procedure of these bodies. It would seem that any State or Government may call such a Congress or Conference and invite such Powers as it pleases.[6] The invited Powers may accept with or without conditions, or may decline the invitation altogether.[7] Each State which has been invited may send as many delegates or representatives as it chooses, but these together have but one vote, usually cast by the head of the delegation.

After the selection of the President[8] and other officers, and the exchange and verification of their powers, special commissions or committees[9] are chosen for the discussion and determination of particular subjects. These are again discussed and voted upon in full session by the Congress or Conference as a whole. To give full legal validity to a vote or resolution, practical unanimity[10] is necessary, though the majority may consider the motion binding upon its members. The results achieved at each session are collected into a *procés-verbal* (minutes) or Protocol. The body of articles or resolutions adopted are finally collected into a whole — the Final or General Act, which is signed by the plenipotentiaries of the several States, with or without reservations.

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[5] See *supra*, note on p. 81.

[6] The inviting Power also usually formulates the program, as did Russia for the two Hague Peace Conferences.

[7] "No State can be a party which has not been invited, or admitted at its own request." 1 Oppenheim, § 484, p. 511. But it is customary to invite all States interested in the particular objects of the Conference. No Sovereign State should be excluded from a Congress or Conference dealing with questions which interest the international community as a whole.

[8] It has been customary to select as President the First Plenipotentiary or Minister of Foreign Affairs of the State in whose territory the Congress or Conference is held, but this custom was not followed at the two Hague Peace Conferences. The First Plenipotentiary of Russia was selected as a compliment to the Czar who had called these Conferences.

[9] The Hague Peace Conference of 1907 was divided into four general commissions which were divided (with one exception) into two subcommissions. These subcommissions were too large, for they ranged from 75 to 103 members (inasmuch as any plenipotentiary could register on one or all of them). In some cases, Committees of Examination were appointed to report to the subcommittees. In addition, there was a small Commission on Petitions and a larger Commission on Editing for the Conference as a whole. There is great need for a better organization of the next Hague Conference.

For further information on the organization and procedure of the Second Hague Peace Conferences, see Hull, 31–34; and Scott, 112–124.

[10] By practical or quasi-unanimity is meant the agreement of nearly all the

294. **Language.** — The official or customary language used at these Conferences is French — the language of diplomacy *par excellence;* but any delegate has a right to the use of his own mother tongue.

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For a list of 116 *Official Congresses*, or *Conferences*, see Baldwin, 1 *A. J.* (1907), 808 ff. For an annual review of official Conferences, see Fried's *Annuaire de la vie internationale*.

States, including all the more important ones. The continued and persistent opposition of a Great Power is nearly always fatal to a proposal, though it may not oppose its insertion in the Final Act; the opposition of several smaller or relatively unimportant States is, on the other hand, frequently ignored. Their legal rights remain unimpaired, for they are not bound to sign the Final or General Act, or they may withdraw from the deliberations of the Conference.

CHAPTER XX

INTERNATIONAL TREATIES

295. **Definition.** — International Treaties or Conventions[1] are agreements or contracts between two or more States, usually negotiated for the purpose of creating, modifying, or extinguishing correlative rights and reciprocal obligations.

296. **Classification of Treaties.** — Treaties are of many kinds and variety of content. Since all attempts at a scientific classification of treaties have failed,[2] it is perhaps the most convenient

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[1] The terms "treaty" and "convention" are practically synonymous, though the latter term is perhaps applied more frequently to treaties of lesser importance. There are various other kinds of agreement between States, such as *protocols* (see *supra*, § 293), *cartels* (see *infra*, note on p. 406), *declarations* (usually of a reciprocal character), *modi vivendi* (working arrangements), exchange of *notes* or *letters*, and *sponsions*, i.e. agreements *sub sperati* made between representatives who are not properly commissioned or who act in excess of authority.

Concordats are agreements between Catholic States and the Pope concerning the affairs of the Roman Church in Catholic countries.

[2] 1 Oppenheim, § 492, and n. 2 on p. 518. The old division of treaties into *real* and *personal* has no longer any practical value. More useful is F. de Marten's (I, § 113) classification of treaties into *political* and *social*, but it is suggestive rather than exhaustive. Some authorities substitute the term "economic" for "social." Pradier Fodéré (II, Nos. 920 ff.) divides treaties, considered as to their object, into *general* and *special*. This division seems somewhat arbitrary, but it affords a convenient means of summary. Under General Treaties, he includes treaties of peace, of political union, alliance, guarantee and protection, neutrality, cession, commerce, and custom unions. Under the head of Special Treaties, he deals with Concordats, boundary treaties, those establishing servitudes, treaties of navigation, consular conventions and capitulations, conventions relating to literary and artistic property, industrial property, extradition treaties, postal, and telegraphic conventions, and conventions relating to railroads.

Perhaps the most scientific classification of treaties is that which divides them into executed, transitory, or dispositive treaties on the one hand; and executory, continuing, or permanent treaties on the other. "An executory contract is one in which a party binds himself to do, or not to do, a particular thing . . . A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant." Chief Justice Marshall, in *Fletcher* v. *Peck*, 6 Cranch, 136. Cited by Taylor, § 343, p. 367.

to refer to them in terms of their nature, purpose, or subject matter; as, for example, treaties of alliance, protection, guarantee, peace, neutrality, commerce, extradition, arbitration, copyright, monetary treaties, consular conventions, etc. We may also speak of treaties as simple or conditional, unilateral or bilateral (as to whether the contracting parties are reciprocally bound or not), preliminary or definitive, accessory, additional, subsidiary, or principal (as to whether they depend on a previous treaty or not) etc.

Especially important[3] is the distinction between ordinary treaties which are mere bargains and the great Lawmaking or International Law Treaties, such as those negotiated by the Hague Peace Conferences, which will probably mark an epoch in the development of Internationalism.

297. **Conditions for the Validity of Treaties.** — The following are the essential conditions for the validity of a treaty:

(1) The parties to it must be capable of contracting. Fully sovereign States have complete contracting power, and part- or semi-sovereign States such measure of contracting power as has been retained by or conferred upon them.[4] All treaties in excess of this power are null and void.

(2) The persons or agents who negotiate the treaty must have

Westlake (I, 60 f.) defines what he prefers to call dispositive treaties as those "which dispose of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting a right of way over it, disposes of or about the field by transferring the property in it to the purchaser, or creating the right of way over it in the grantee." *Cf. Ibid.*, 283–284.

Examples of executed or transitory treaties are boundary treaties, treaties of cession, or those clauses in a treaty which create servitudes. Examples of executory treaties are treaties of alliance, commerce, extradition, guarantee, etc.

This classification has the additional advantage, at least in the case of transitory treaties, of furnishing us with a category of obligations which usually persist in spite of changes brought about by war or the Succession of States. See *supra*, § 129; and *infra*, § 344.

[3] For a discussion of treaties as a source of International Law, see *supra*, § 14.

[4] As in the case of the member State of a Confederacy, or a State under Suzerainty. The capacity of a State to contract may be also limited in certain respects by its written constitution. Whether the Treaty-making Power of the United States is thus limited is a controverted question.

For the opposing views on this important problem and opinions of leading Justices, see Hershey, "The Japanese School Question and the Treaty-making Power," in the *Am. Pol. Sci. Review* for 1907, pp. 400, ff. See especially Butler, *Treaty-making Power*, §§ 3 and 275; 5 Moore, *Digest*, §§ 735–738; and 1 Willoughby, *The Const. Law of the U. S.*, ch. 35.

full powers from their Government.[5] If they exceed these powers, their Government is not bound. But where certain material advantages have been derived from such action, it is the duty of the State receiving such benefits either to make compensation or to restore things to their former condition so far as practicable, "unless the contract made was evidently in excess of the usual powers of a person in the position of the negotiator, in which case the sovereign State, having prejudiced itself by its own rashness, may be left to bear the consequences of its own indiscretion." [6]

(3) Freedom of consent. But in interpreting this phrase we must remember that "in International Law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for." Consequently, International Law "regards all compacts as valid, notwithstanding the use of force and intimidation, which do not destroy the independence of the State which has been obliged to enter into them." [7]

"Violation or intimidation used against the person of a sovereign, of a commander, or of any negotiator invested with power to bind his State, stand upon a different footing." "The only kind of duress which justifies a breach of treaty is the coercion of a sovereign or plenipotentiary to such an extent as to induce him to enter into arrangements which he never would have made but for fear on account of his personal safety. Such was the renunciation of the Spanish crown extorted by Napoleon at Bayonne, in 1807, from Charles IV and his son Ferdinand. The people of Spain broke no faith when they refused to be bound by it and rose in insurrection against Joseph Bonaparte, who had been placed upon the throne." [8] Gross error or fraud, as the use of a forged map, also vitiates a treaty.[9]

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[5] "There are also persons who in virtue of being intrusted with the exercise of certain special functions have a limited power of binding it by contracts relative to matters within the sphere of their authority. Thus officers in command of naval or military forces may conclude agreements for certain purposes in time of war." Hall (6th ed.), 318.

[6] *Ibid*, 319.

[7] *Ibid.*

[8] Hall, *op. cit.*, 320, and Lawrence (4th ed.), 327.

[9] "But the rule that a contract is vitiated by fraud applies, subject to the obser-

(4) The treaty must be in conformity with the rules and principles of International Law. Thus a treaty would not be binding which had as its object the subjugation or partition of a country, an assertion of a proprietary right over a portion of the open sea, or the establishment of the slave trade.

298. **Form and Ratification of Treaties.** — Although no prescribed form[10] is necessary, treaties are usually written and signed with some degree of formality.[11] After being signed by the agents or negotiators, they are usually ratified or confirmed by the treaty-making power itself[12] or by an authorized agent.

Mutual consent may be inferred; and the treaty is, therefore, actually concluded from the moment it is signed by negotiators acting with full powers. Partial or conditional ratification is not permissible, and the date of signature marks the beginning of the binding force of the treaty, though its operation is practically suspended until it has been ratified.[13] The effects of ratification are retroactive so far as public rights or the contracting Governments are concerned, but "a different rule prevails when the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified; it is not considered as conclusive until there is an exchange of ratification."[14]

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vation that some latitude must be allowed in negotiating treaties of peace to the right of misleading an adversary which is incident to war." 1 Westlake, 279.

[10] Agreements may even be made by the display of symbols, as when a white flag is raised in token of surrender. Less formal agreements are sometimes made by exchange of notes.

[11] At present treaties are usually signed in the alphabetical order of the names of the States in the French language. Sometimes the order is determined by lot. "In the draft of the treaty for his own State, the representative of that State may, following the principle of the alternat, sign first." Wilson, p. 197.

[12] In absolute monarchies, this is generally the monarch; in republics, the President or some representative body. In the United States it is the President and two-thirds of the Senate.

Ratification is customary even where the treaty does not prescribe ratification. If no time is specified, a reasonable period is presumed. Ratification usually consists in the exchange of documents, but it may be tacitly shown by execution.

[13] Some publicists (*e.g.* Despagnet, No. 441; Jellinek, *Die rectliche Natur der Staatenverträge*, 55; Nippold, *Der völkerrechtliche Vertrag*, 123; and Ullmann (2nd ed.), § 78) maintain that mutual consent and the conclusion of the treaty are indicated by ratification; but this view is not in agreement with the facts of international practice.

[14] 5 Moore, *Digest*, § 762, p. 245, citing Davis, *Notes*, etc. The leading decision on this point is *Haver* v. *Yaker* (1869), 9 Wall. 32, and Scott, 420. See also 2 Butler, *Treaty-making Power of the U. S.*, § 383.

The question as to whether a State may legally refuse to ratify a treaty concluded by its properly accredited agents acting within their powers was long controverted,[15] but it may be now regarded as definitely resolved in the affirmative. In practice, ratification is given or withheld at discretion.[16] There are still publicists who maintain that a State is *morally* bound to ratify, but none (so far as known to the writer) claim that a State is thus legally bound. Ordinarily, ratification will follow signature as a matter of course, and a State refusing to ratify on insufficient grounds or from mere caprice would soon lose credit with the rest of the international community.

299. **Rules for the Interpretation of Treaties.** — The rules for the interpretation of treaties are derived from general jurisprudence. Strictly speaking, they form no part of International Law proper, and the contracting States are free to apply any rules they may agree upon; but it may nevertheless be found useful to indicate a few of the rules of interpretation which have found most general acceptance.

"The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence, but is not generally accepted in the civilized world." [17]

With this word of caution from a leading authority, we may venture to lay down the following rules:

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[15] The older authorities like Grotius, Bynkershoek, Vattel, G. F. de Martens etc., generally held that ratification was obligatory, at least by natural law. This view has been generally abandoned.

[16] "The ratification may be refused by any party, and although this would be offensive if done without grave reason, it is impossible to limit the right of doing it." 1 Westlake, 280.

Of course there has never been any question of the right to refuse ratification in the case of States in which, like the United States, the power of negotiation and ratification are in different hands.

[17] 1 Westlake, 282. Westlake does not consider specific rules of "much practical use," but he favors a "large and liberal spirit of interpretation."

On the *Interpretation of Treaties*, see especially Adler, in 26 *Law Mag. Rev.* (5th ser.), 62 ff. and 164 ff.; Appert, in 26 *J. I. P.* (1899), 433 ff.; Bonfils, Nos. 835–844; 1 Cobbett, *Cases*, 328–333; 2 Fiore, Nos. 1032–1046; Hall (6th ed.), 327–334; Hyde, in 3 *A. J.* (1910), 46 ff.; * Moore, *Digest*, §§ 763–764; 1 Oppenheim, §§ 553–554; 2 Phillimore, Pt. V., ch. 8, §§ 64–95; 2 P.-Fodéré, Nos. 1171–1188; Pic, in 17 *R. G. I. P.* (1910), 5–35; Taylor, §§ 377–393; Vattel, Bk. II, ch. 17; 2 Wharton, *Digest*, § 133; Wheaton (Atlay's ed.), 287 a; Wilson, ch. 7; Woolsey, § 113.

(1) The language of a treaty should be interpreted according to its plain or reasonable sense.[18] Ordinary words should be taken in their ordinary or everyday sense, and technical words in their technical sense. The interpretation should be neither too literal nor too technical.

(2) Words having more than one meaning should be interpreted in the general rather than the technical sense, unless clearly used in the technical sense. "When terms used in a treaty have a different legal sense within the two contracting States, they are to be understood in the sense which is proper to them within the State to which the provision containing them applies; if the provision applies to both States, the terms of double meaning are to be understood in the sense proper within them respectively."[19]

(3) "If the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with general recognized principles of International Law and with previous treaty obligations toward third States." Furthermore, in case of ambiguity, that "meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties' territorial and personal supremacy, or which contains less general restrictions upon the parties."[20]

(4) "There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipula-

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[18] Thus, Art. 9 of the Treaty of Utrecht (1713) stipulated that the port and fortifications of Dunkirk should be destroyed and never rebuilt. France complied with this stipulation, but proceeded to violate the spirit of this provision by building a larger port at Mardyck, within a league of Dunkirk. France ultimately recognized the reasonableness of the British protest and discontinued the building of the new port.

[19] Hall (6th ed.), 329. Hall gives the following illustration: "Thus by the treaty of 1866 it was stipulated between Austria and Italy, that the inhabitants of the provinces ceded by the former power should enjoy the right of withdrawing with their property into Austrian territory during a year from the date of exchange of ratifications. In Austria the word inhabitant signifies such persons only as are domiciled according to Austrian law; in Italy it is applied to every one living in a commune and registered as resident. . . . As the provision referred to territory which was Austrian at the moment of the signature of the treaty, the term inhabitant was construed in conformity with Austrian law."

[20] 1 Oppenheim, § 554.

tions is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulations."[21]

(5) A treaty should, if possible, be so construed as to give effect to the fundamental rights of a State, such as independence, etc. In case of doubt, the language of the treaty should be construed as favorable to the party assuming the obligation.

(6) In case of conflict between different treaties with the same State, or different provisions of the same treaty, (*a*) the later treaty is binding, and (*b*) that which is specifically stated prevails over the more general statement. (*c*) An imperative prohibition usually takes precedence of a general permission.

300. **Most-favored-nation Clause.** — Especially important is the interpretation of the most-favored-nation clause in commercial treaties. This is a clause which provides that the citizens or subjects of the contracting States may enjoy the privileges accorded by either party to the most-favored nation.[22] The United States has always denied that this clause, in its simple or reciprocal form, applies to reciprocity treaties or concessions based upon reciprocal advantages;[23] Great Britain, on the other hand, has maintained that the most-favored-nation clause should be unconditional in all cases, and that a favor or advantage granted to one State should extend to all other nations enjoying most-favored-nation privileges with that State.

301. **Treaties of Guarantee.** — Treaties of guarantee merit particular attention by reason of their special character. They are " agreements through which one or more Powers engage to maintain given conditions or rights,"[24] as, for example, the per-

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[21] Secretary Livingstone to Baron Lederer, cited in 5 Moore's *Digest*, p. 249. It should be noted that this is a rule of construction rather than of interpretation proper.

[22] "It may be a gratuitous conferring of privileges, it may be conditional, or it may depend upon like concessions on the part of the other nation." Wilson, p. 204.

On the *Most-favored-nation Clause*, see especially Barclay, in 17 *Yale Law J.*, 26; Farra, *Les effets de la clause de la nation la plus favorisée* (1912); Glier, *Die Meistbegünstigungs-Klausel* (1905); Herod, *Favored Nation Treatment* (1901); Hornbeck, "The Most-favored-nation Clause, in 3 *A. J.* (1910), 395 ff., 619 ff., 797 ff.; Hyde, in 3 *A. J.* (1910, 57 ff.; Kasson, *Reciprocity* (1901); * 5 Moore, *Digest*, §§ 756–769; Osborne, in 181 *No. Am. Rev.* (1905), 731 ff.; 4 P.-Fodéré, Nos. 2020 ff., 2 Wharton, *Digest*, § 134; *Whitney* v. *Robertson* (1887), 124 U. S. 190, and Scott, 422 (citing *Bartram* v. *Robertson*, 122 U. S. 116); Wilson, § 76.

[23] See especially the discussions between the United States and France, England, and Germany, in 5 Moore, *Digest*, § 765.

[24] Wilson, p. 205. On *Treaties of Guarantee*, see especially Bluntschli, Arts.

manent neutralization of Belgium or Switzerland, or the independence and integrity of the Ottoman Empire.

"The effect of guarantee treaties is the creation of the duty of the guarantors to do what is in their power to secure the guaranteed objects."[25] The kind and quantity of coercion to be applied to carry out this purpose depends upon various circumstances, such as ability to render assistance at the particular time, the request of the party whose rights are guaranteed, his behavior, vital changes in political conditions, etc.

There is a difference of opinion respecting the duty of a State in case of a *collective* guarantee. In 1867 Lord Derby maintained that in the event of the violation of the neutrality of Luxemburg, the guarantors were not bound unless they acted in concert. But if this view were to prevail, it would be difficult to see the worth of a collective guarantee.[26]

302. **Effect of Treaties.** — Treaties are directly binding upon the contracting parties alone,[27] but they may also affect the relations of third States by creating conditions which these are bound to respect, or from which they may derive advantage.[28] Of the various means formerly employed to secure the performance

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430–440; Bonfils (Fauchille), Nos. 882–893; Despagnet, Nos. 145 and 461; * Hall (6th ed.), 334–338; Heffter (Geffcken), § 97; * Milanovitch, *Des traités de guarantie* (1888); * Oppenheim, §§ 574–576; 2 Phillimore, §§ 56–63; 2 P.-Fodéré, Nos. 969–1020; * 2 Rivier, 97–105; Taylor, §§ 350–353; Vattel, II, §§ 235–239; Wheaton, § 277; Wilson, § 77; and Woolsey, § 109.

[25] 1 Oppenheim, § 575.

[26] See *supra*, § 109.

[27] Treaties are not, as a rule, directly binding upon the nationals or subjects of a State; they bind the States themselves. But the Constitution of the United States makes them a part of our municipal law. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Art. 6, § 2, of the Const. of the U. S.

Our Supreme Court holds that "a treaty may supersede a prior Act of Congress, and an Act of Congress supersede a prior treaty." *Ward* v. *Race Horse*, 163 U. S. 511.

On the much-discussed constitutional question whether our House of Representatives is under obligations to make the appropriations necessary to carry treaties into effect, see 1 Butler, *Treaty-making Power*, chs. 10–12; and 5 Moore, *Digest*, § 759; 1 Willoughby, § 206.

[28] An example would be a treaty providing that a State's navigable waters shall be open to the merchantmen of all nations. Third States would be bound to respect boundary treaties.

Provision is sometimes made for the adhesion or accession of third States. For the technical meaning of these terms, see 1 Oppenheim, §§ 532 and 533.

of treaties — oaths, hostages, pledges, occupation of territory,[29] and treaties of guarantee — the latter is the only one still generally in use.

303. **Termination of Treaties.** — Treaties may become extinct through the expiration of their time limit, or by the performance of the specific object of the contract. They may be dissolved by mutual consent, an express renunciation of advantages, a voluntary release by one of the contracting parties, or by denunciation or withdrawal by notice in accordance with the terms of the agreement. They may become void upon the cessation of conditions essential to the continuance of the treaty or upon the extinction of the subject[30] or object of the treaty, if found legally, physically, or morally impossible of execution; or, in certain cases, upon the outbreak of war. They may become voidable, *i.e.* subject to annulment or cancellation, through war, a subsequent change of status of international personality on the part of one of the contracting parties, if their terms are inconsistent with subsequent International Law (as, *e.g.* in the case of the abolition of privateering), or if any of the implied conditions[31] under which the treaty has been made are violated. Such implied conditions are that the treaty shall be observed in its essentials[32] by both parties, that it shall remain consistent with the fundamental rights of independence and self-preservation, and that there shall be no *vital* change in the circumstances or conditions under which the treaty was made. The clause *rebus sic stantibus* is an implied condition in all treaties.[33]

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[29] Temporary occupation of territory is still occasionally employed to secure the payment of a debt or the exaction of a war indemnity. The last case of a treaty secured through hostages was that of Aix-la-Chapelle in 1748.

[30] For the effect upon treaties of the "Succession of States," see *supra*, §§ 129–130, pp.; for the effects of war, see *infra*, § 344.

[31] This rule is thus stated by Hall (p. 342 of 6th ed.): "Neither party to a contract can make its binding effect dependent at will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered."

[32] This is the view of Hall (543 ff.) and a minority of the publicists. For the opinion of the majority that there is no distinction in this respect between the essential and non-essential parts of a treaty, and that the breach of any portion of the agreement renders the whole compact voidable, see 1 Oppenheim, § 549.

[33] This is the view of the great majority of publicists, and it is in accord with international practice. For examples drawn from the practice of the United States, see Foster, *Practice of Diplomacy*, ch. 15; and 5 Moore, *Digest*, § 772.

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On the clause *rebus sic stantibus*, see especially Schmidt, *Über die völkerrechtliche clausula rebus sic stantibus* (1907).

The Conference held in London in 1871 to settle the Black Sea Question declared, "It is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement."

As Lawrence (4th ed., p. 328), observes: "This doctrine sounds well; but a little consideration will show that it is as untenable as the lax view which would allow any party to a treaty to violate it on the slightest pretext . . ."

For the violation of the Treaty of Paris (1856) by Russia in 1870, and the Treaty of Berlin (1878) by Austria in 1908, see Hall (Atlay's 6th ed.), 344–350.

PART IV

SETTLEMENT OF INTERNATIONAL DIFFERENCES

304. **Introductory.** — International differences may arise on various grounds which have been broadly distinguished as legal or political in their nature.[1] Legal differences are those arising from disputes or controversies to which a recognized legal principle or more or less clearly established rule of International Law may be applied. Political differences are those which result from a conflict of political, social, or economic interests and to which it is difficult or impossible to apply such rules or principles. Modes of settling international differences may be broadly classified as peaceful or amicable, and forcible or non-amicable. It is manifestly easier to apply amicable modes of settlement to legal than to political differences. States are morally bound to exhaust all peaceful or amicable modes of settling their differences before resorting to forcible or non-amicable means.

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[1] It is not always possible to separate legal and political differences in practice, for they are usually of a mixed character, and legal claims have often been made a pretext for disguised political aggression.

On this distinction between legal and political differences, see especially: Bulmerincq, in 4 Holtzendorff, 5 ff.; Nippold, *Die Fortbildung des völkerrechtlichen Verfahrens* (1907), 127 ff.; *2 Oppenheim, §§ 1–6; 2 Rivier, 149 f.; Ullmann (2nd ed.), § 148; 1 Westlake, 339 ff.; Wilson, § 81.

CHAPTER XXI

AMICABLE MEANS OF SETTLEMENT OF INTERNATIONAL DIFFERENCES

THERE are at least five recognized amicable modes of settling international differences.

305. (I) **Negotiation.** — The more usual or customary mode is by means of *negotiation*.[1] Diplomacy is constantly at work avoiding friction, smoothing over difficulties, effecting compromises, and settling claims.[2] In case of a serious difference, States are bound to try this mode of settlement before resorting to forcible means of coercion or redress — a rule which appears to have been recently violated by Italy in sending an ultimatum to Turkey without suitable prior negotiations. Negotiations may be carried on orally, by an exchange of notes or written communications, or at a Congress or Conference.[3]

306. (II) **Good Offices.**[4] — *Good offices* consist in suggestions or advice on the part of third Powers, offered for the purpose of inducing States at variance with each other to attempt by negotiation, or otherwise, an amicable settlement of their differences.

307. (III) **Mediation.** — *Mediation* partakes more of the character of an actual diplomatic intervention on the part of third

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[1] On *Negotiation*, see especially: Bonfils, Nos. 931–932; Bulmerincq, in 4 Holtzendorff, 13–17; 3 Calvo, §§ 1670 ff.; Despagnet, No. 470; Foster, *Practice of Diplomacy;* Kamarowsky, *Le tribunal int.* (1887), 73–79; 2 Oppenheim, § 4; * 1 and 2 P.-Fodéré, *Cours*, etc., 514 ff. and 298 ff.; 6 *Ibid.*, *Traité*, Nos. 2585–2586.

See also the references on the nature of diplomacy, in Bibliography at the close of Ch. I, *supra*, p. 13.

[2] On *Claims*, see especially: Brewer and Butler, in Article on "International Law," in *Cyclopedia of Law and Procedure*, IX (1906); 6 Moore, *Digest*, ch. 21; Moore, *Int. Arbitrations*, *passim* (see index); and Wharton, *Digest*, ch. 9.

[3] See *supra*, ch. 19.

[4] The terms "good offices" and "meditation" are often confused, especially in diplomatic documents. This is very natural, as the former may lead to the latter, of which it is frequently the first step. There is no warrant for the use of the phrase *armed mediation*, which would amount to a forcible intervention.

Powers. The mediator assumes the role of a middleman and plays a leading and regular part in the conduct of negotiations; but he acts as a conciliator or mutual friend rather than as a judge, and he is usually more anxious to effect a compromise than to secure a settlement of the dispute on a judicial basis. This mode of procedure is especially adapted to the settlement of *political* differences. Mediation may be single or collective in character, and it may be designed to terminate as well as to prevent a war or other serious international conflict.[1]

The Hague Peace Conferences of 1899 and 1907 laid down the following rules in respect to the use of Good Offices and Mediation:[5]

"In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers (Art. 2).

"Independently of this recourse, the Contracting Powers deem it expedient *and desirable*[7] that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

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[5] Through treaties, States occasionally agree to submit to a sort of obligatory mediation in advance. For examples, see Bonfils (Fauchille), Nos. 934, 930, 941; 2 Piédeliévre, Nos. 670–678; and 2 Rivier, 164.

For historical examples of mediation (which are very numerous) see: Bonfils, Nos. 937–942; 3 Calvo, §§ 1684–1704; 6 *Ibid.*, §§ 349–351; and 6 Moore, *Digest*, §§ 1065–1067 (for instances of the tender of good offices and mediation on the part of the United States).

An interesting example of the use of good offices or mediation by the United States is that by ex-President Roosevelt during the Russo-Japanese War, which resulted in the Treaty of Portsmouth in 1905. Mr. Roosevelt's activity during the negotiations would seem to show that it was more than a tender of good offices. Yet it hardly amounted to a formal mediation. See Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 347 ff., and 353 ff. (including notes).

[6] 1 H. C. (1899 and 1907), Arts. 2 to 7 (inclusive). It should be noted that the tender of good offices or mediation on the part of third Powers prior to or during hostilities is a legal right, but not an obligation. However, the Powers at variance are bound to have recourse to this mode of settling disputes, *so far as circumstances allow*. But this qualification renders the obligation largely illusory.

The conventions of the two Hague Conferences may be most conveniently consulted in Higgins, *The Two Hague Conferences* (1910), where they are printed on parallel pages. See also 2 Scott, *The Hague Peace Conferences; Ibid., Texts of the Hague Conferences;* and Whittuck, *Int. Documents*.

[7] The phrase in *italics* is the sole contribution to this subject by the Conference of 1907.

"Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

"The exercise of this right can never be regarded by either of the parties at variance as an unfriendly act (Art. 3).

"The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance (Art. 4).

"The duties of the mediator are at an end when once it is declared, either by one of the contending parties, or by the mediator himself, that the means of reconciliation proposed by him are not accepted (Art. 5).

"Good offices and mediation, undertaken at the request of the contending parties or on the initiative of Powers strangers to the dispute, have exclusively the character of advice, and never have binding force (Art. 6).

"The acceptance of mediation cannot, in default of agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

"If mediation takes place after the commencement of hostilities, the military operations in progress are not interrupted, in default of agreement to the contrary (Art. 7)."[8]

308. (IV) **International Commissions of Inquiry.** — The Hague Conference of 1899 created a new mode of[9] settling a

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[8] Article 8 recommended the following form of special mediation, when circumstances allow:

"In case of a serious difference endangering peace, the contending States choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

"For the period of this mandate, the term of which, in default of agreement to the contrary, cannot exceed thirty days, the States at variance cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers. These Powers shall use their best efforts to settle the dispute.

"In case of a definite rupture of pacific relations, these Powers remain jointly charged with the task of taking advantage of any opportunity to restore peace."

This form of special mediation, which is based upon the use of seconds in duelling, was fathered by Mr. Holls, one of the American delgates. It has never been employed. On *Special Mediation*, see Holls, *Peace Conference*, 187–203.

[9] This institution appears to owe its origin mainly to the great Russian publicist, F. de Martens. He maintained that International Commissions of Inquiry are not an innovation, and pointed to the various Mixed Commissions selected to trace boundary lines, settle claims, etc., as historical precedents. While there is a certain

certain class of international disputes. It recommended that "in differences of an international nature, involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, . . . the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation."[10]

In subsequent articles[11] the Convention of 1899 provided that International Commissions of Inquiry should be constituted by special agreement between the parties in dispute and, unless otherwise stipulated, in the manner fixed by Art. 32 of the Convention for the Pacific Settlement of International Disputes.[12] This convention, or special agreement, defines the facts to be examined, determines the extent of the powers of the commissioners, and settles the procedure.[13] "The report of the Commission

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amount of justification for this view, I rather agree with those who hold that Mixed Commissions constitute a special form of arbitration, and that the International Commission of Inquiry, as instituted by the Hague Conventions, furnishes us with a new form of International Tribunal. See, *e.g.* Beaucourt, *Les commissions int. l'enquête* (1909), 15–47; Kamarowsky, *Le tribunal int.*, 165–184; Nippold, *Die Fortbildung*, etc., § 19.

[10] 1 H. C. (1899 and 1907), Art. 9. Owing to the opposition of the smaller States, both Conferences refused to make recourse to International Commissions of Inquiry obligatory.

[11] 1 H. C. (1899), Arts. 10 to 14.

[12] Art. 12 of the Convention of 1907 provides that they shall be formed in accordance with Arts. 45 and 57 — the substitutes of Arts. 24 and 32 of the Convention of 1899. These prescribe the mode in which the Arbitration Tribunal is to be formed and organized in case the parties at variance fail to come to a direct agreement as to its composition.

[13] 1 H. C. (1899), Art. 10. Art. 10 of the Convention of 1907 adds: "It determines the mode and time in which the Commission is to be formed. . . . It also determines, if there is need, where the Commission is to sit, and whether it may remove to another place, the language the Commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed."

"If the Convention of Inquiry has not determined where the Commission is to sit, it will sit at the Hague." 1 H. C. (1907), Art. 11.

"The parties are entitled to appoint special agents to attend the Commission of Inquiry, whose duty it is to represent them and to act as intermediaries between them and the Commission. They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interest before the Commission." 1 H. C. (1907), Art. 14.

is limited to a statement of facts, and has in no way the character of an award. It leaves to the parties at variance entire freedom as to the effect to be given to this statement."[14]

In consequence of the successful settlement of the North Sea or Dogger Bank Incident[15] of 1904 by means of a Commission

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"The International Bureau of the Permanent Court of Arbitration acts as registry for the Commissions which sit at the Hague," and is given charge of the archives. Arts. 15 and 16.

[14] 1. H. C. (1899 and 1907), Arts. 14 or 35.

[15] This was a very strange and sensational incident. On the night of October 21–22, 1904, a fleet of British fishermen trawling for cod off the Dogger Bank in the North Sea were suddenly attacked by warships belonging to the Russian Baltic Squadron, then on its ill-fated voyage to the Far East. Considerable damage was done and two lives were lost.

British feeling was stirred to its highest pitch of excitement by this event (which was regarded as the culmination of a series of Russian "outrages"), and the two countries seemed on the brink of war, when France tendered her good offices and it was finally agreed (on Nov. 25, 1904) that an International Commission of Inquiry should be appointed, consisting of five members of high naval rank, three of whom were in the service of neutral Powers.

It was further agreed that "the Commission shall inquire into and report on all circumstances relative to the North Sea incident, *and particularly on the question as to where the responsibilities and the degree of blame* attaching to the subjects of the two High Contracting Parties or of other countries in case their responsibility should be established by the inquiry." Art. 2 of the *Declaration of St. Petersburg*. For the English text of this Declaration, see Barclay, *Problems of International Practice and Diplomacy*, 36; and *Parliamentary Blue Book on Russia*, No. 2 (1905), Appendix. The French text is given by 1 Mérignhac, 442–444.

It should be noted that the powers granted to the North Sea Commission were much broader than those contemplated by the Hague Convention.

The North Sea Commission met in Paris on January 9, 1905, and rendered its verdict on February 25th. The majority held in effect that the Russian Admiral Rojestvensky was responsible for the action and results of the firing upon the fishing fleet, but that he was not personally to blame, *i.e.* though responsible for the firing and not justified in fact, there was an apparent justification for what he did and he was not subject to trial and punishment. For the English text of the Report of the Commission, see Smith and Sibley, *Int. Law during the Russo-Japanese War*, App. I, 452 ff.

There can be little doubt that the firing was due to a state of panic among the Russian officers of the fleet, induced by a fear or belief that they were in great danger of attack by Japanese torpedo boats. The Russian Government recognized its responsibility by the payment of £65,000 as indemnity due the Hull fishermen.

"The institution of the North Sea Commission and its successful working under such trying circumstances must be pronounced a great victory both for the principle of international inquiry and of international arbitration. Although nominally called an International Commission of Inquiry analogous to those provided for by Arts. 9–14 of the first Hague Convention, it really combined the functions of an International Court of Tribunal of Justice with those of a Commission of Inquiry and, in of Inquiry modeled somewhat on that contemplated by the Hague Convention of 1899, the Hague Conference of 1907 revised the rules of 1899 and adopted a code of procedure for this new form of International Tribunal, based largely upon experience gained through the establishment and working of the North Sea Commission of 1905.[16]

309. (V) **International Arbitration. Definition.** — International Arbitration is a quasi-judicial mode of settlement of international disputes in which, by agreement of the parties concerned,

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accordance with the purposes for which it was organized, it passed upon the questions of *responsibility* and *degree of blame* as well as inquired into and reported upon the facts or circumstances of the case. It was in fact an arbitration *sui generis*, of a kind new and unprecedented in the history of international relations; for it was not only applied, at a time of great excitement, to a question affecting the so-called national honor and vital interests (?) of both parties to the dispute, but it introduced into our administration of international justice a new method of procedure in cases of alleged violation of the Law of Nations. It has set a precedent for the establishment of tribunals combining the functions of an International Court of Arbitration with those of a Court of Inquiry for the investigation and trial before the bar of the public opinion of the world, of those charged with international crimes and misdemeanors, or serious violations of International Law. It is true that the accused in this case, if found guilty, were to have been punished by a national penal sanction; but the power of imposing an international censure was vested in the North Sea Commission, by the Declaration of St. Petersburg, and, although the organization and procedure of the Commission may be open to criticism in matters of detail, there is no valid reason why the principles involved in this case should not be given even a more extended application." Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 240–241.

Though this mode of settling international disputes appears to be without precedent, there have been many serious controversies to which it might have been applied with good hope of success. Had the blowing up of the *Maine* not been complicated with other and even more serious matters, our war with Spain might possibly have thus been averted by recourse to this means. A number of international incidents, exhibiting more or less analogy to the North Sea incident, are cited by Smith and Sibley, *op. cit.*, 295–319.

On the *North Sea Incident*, see Beaucourt, *Les commissions internationales d'enquête* (1909), ch. 3; 1 Cobbett, 27–30; Hershey, *Int. Law and Diplomacy of the Russo-Japanese War* (1906), ch. 18; Higgins, *The Hague Peace Conferences*, (1909), 167–169; Mandelstam, in 12 *R. D. I. P.* (1905), 161–351; I Mérignhac, *Traité*, 442–447; 1 Meurer, 158–160; De la Penha, *La commission internationale d'enquête sur l'incident Anglo-Russe de la Mer de Nord* (1905); Smith and Sibley, *International Law during the Russo-Japanese War* (1905), 275–319, 446–458.

[16] For these rules of procedure, which are purely optional, see 1 H. C. (1907), Arts. 18–34. For a summary, see Hershey, in 2 *A. J.* (1908), 38.

The Russian De Martens also proposed in effect to render recourse to International Commissions of Inquiry obligatory in a certain very limited sense and include the fixing of responsibility among their duties, but the Conference of 1907 rejected his wise proposals.

one or more arbiters are selected for the decision of the controversy.[17]

310. **The Compromis.** — It is customary for the parties at variance to frame a special agreement called the *compromis*,[18] defining the nature and limits of the controversy and the powers of the arbiters, naming the arbiters or designating the mode of their selection,[19] formulating or indicating the rules of procedure to be followed, the rules or principles (whether of equity or International Law) which should determine the decision,[20] the language, place of meeting, etc. "Recourse to arbitration implies an engagement to submit in good faith to the award." [21]

311. **The Arbitral Clause.** — Arbitration was originally[22] purely voluntary or facultative in character, but it became in a sense

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[17] "International Arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law." 1 H. C. (1899 and 1907), Arts. 15 and 37.

Owing to the nature of the interests involved, the mode of selection of arbiters, and the lack of definite rules or a clearly defined jurisdiction, arbitration has a semi- or quasi-judicial rather than a pure judicial character. The arbitrators are often not sufficiently judicial and independent, and they seem bent upon effecting a satisfactory compromise rather than administering justice.

[18] See 1 H. C. (1907), Arts. 52–54, 58.

"The Permanent Court (*i.e.* the Hague Tribunal or Court of Arbitration) is competent to settle the *compromis*, if the parties are agreed to have recourse to it for the purpose." It is similarly competent, even if the request is only made by one of the parties, in certain cases. Art. 53.

[19] The arbitrator or arbitrators most frequently selected in modern times have been sovereigns or Heads of States, simple individuals (statesmen, magistrates, jurists, etc.), or a corporate body of individuals.

On the composition and selection of the Hague Court of Arbitration, see *infra*, § 314.

The United States has made frequent use of Mixed Commissions, consisting of both partisan and neutral elements, particularly for the settlement of claims, the tracing of boundary lines, etc. Mixed Commissions may have an administrative, diplomatic, or arbitral character.

On *Mixed Commissions*, see especially Beaucourt, *Les commissions international d'enquête* (1909), 15–47; 3 Calvo, § 1874; Kamarowsky, *Le tribunal international* (1887), 165–184; Moore, *History of Arbitrations* (in 6 vols, — see index); 6 P.-Fodéré, No. 2601; 1 Scott, *The Hague Conferences* (1909), 216–223.

[20] Perhaps the most famous rules thus laid down, were the "Three Rules of Treaty of Washington" for the determination of the *Alabama* Controversy in 1871.

[21] 1 H. C. (1899 and 1907), Arts. 18 and 37.

[22] On the *History of Arbitration*, see *supra*, §§ 31, 44, and 80.

The student should particularly read the note in 5 Moore, *History of International Arbitrations*, 4821 ff. See Darby, *International Tribunals*, 769 ff., for a valuable digest of cases.

obligatory when States began to insert the arbitral clause (*clause compromissoire*), an *a priori* agreement to arbitrate, into treaties.[23] This was the second stage in the history of arbitration.[24]

312. **Special Treaties of Permanent Arbitration.** — Arbitration entered upon its third stage when the arbitral clause expanded into special treaties[25] of permanent arbitration in the latter part of the nineteenth century. This movement, which appears to have begun in Latin America, was given a tremendous impetus by the Hague Conferences of 1899 and 1907, and it has reached such proportions that almost all civilized States are now connected by a network of such treaties.

313. **Projects for General Treaty of Obligatory Arbitration.** — During the next and present stage in the history of arbitration we have witnessed various projects for a general treaty of obligatory arbitration. In 1890 the First Pan-American Conference adopted a project for a general treaty of obligatory arbitration, but it failed of ratification.[26] Various projects for limited obli-

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[23] The arbitral clause was not wholly unknown to the Greeks. See *supra*, § 31. The first modern instance of the insertion of this clause seems to have been that contained in the treaty of 1796 between the United States and Tripoli. It was vaguely included in the Treaty of Guadalupe Hidalgo (1848) between the United States and Mexico, and in a number of treaties between Latin-American States, but does not appear to have become general until the last quarter of the nineteenth century. Mérignhac, *L'arbitrage*, etc., 199-214. On the *Arbitral Clause*, see especially 6 P.-Fodéré, Nos. 2606 ff.; and 2 Rivier, 170 ff.

[24] The arbitral clause appeared: (*a*) in a special or particular form, *i.e.* limited to the treaty itself, or to certain subjects which were specifically enumerated; or (*b*) in a more general form.

[25] See Mérignhac, *L'arbitrage*, p. 206 n., for a list of such treaties between 1876 and 1883. A treaty of permanent arbitration was negotiated between England and the United States in 1897, but it failed to obtain the sanction of the United States Senate. However, in 1908 this body approved no less than twelve arbitration treaties between the United States and France, Switzerland, Mexico, Italy, Great Britain, Norway, Portugal, Spain, Netherlands, Sweden, Japan, and Denmark. For the texts of these treaties, see Supplement to 2 *A. J.* 296–336. For a list of 77 arbitration treaties between 1900 and 1908, see 2 *A. J.* (1908), 824–826. *Cf.* Fried, *Die moderne Friedensbewegung* (1906), 26–27. For a very complete list of arbitration treaties between 1822 and 1905, see Moch, *Histoire sommaire de l'arbitrage* (1905), 35–40. See end of this useful volume for a series of graphic representations.

[26] The Conference adopted obligatory arbitration as a "principle of American International Law," and declared that the "principle of conquest is eliminated from American Public Law." All of the States represented (including the United States), except Chile, voted in favor of these declarations. Alvarez, "Latin America and International Law," in 3 *A. J.* (1909), 329; and Quesada, *Arbitration in Latin*

gatory arbitration[27] were proposed at the Hague Conferences of 1899 and 1907; but they were defeated, owing mainly to the opposition of Germany. In its Final Act, the Conference of 1907 declared that it was "unanimous: (1) In admitting the principle of compulsory arbitration. (2) In declaring that certain disputes, in particular those relating to the interpretation treaties and application of the provisions of international agree-

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America (1907), 15–43. See Supplement to 1 *A. J.* (1907), 299, for a Treaty of Obligatory Arbitration between nine Latin-American States; and *Ibid.*, for Treaty of Arbitration of Pecuniary Claims between the United States and sixteen Latin-American States.

[27] At the Hague Peace Conference of 1899, Russia proposed *inclusive* obligatory arbitration for pecuniary claims and disputes relating to the interpretation or application of about twelve different kinds of treaties. 1 Scott, 321 ff., 803 ff. A majority of States voted in favor of these proposals, which were dropped on account of the opposition of Germany. Nevertheless, the Powers reserved to themselves the right of concluding new treaties of obligatory arbitration. 1 H. C. (1899), Art. 19. There followed a perfect avalanche of arbitration treaties.

In 1907 a similar but larger list of about thirty specified subjects, based on the proposals of Portugal, was discussed. "Of the twenty-four classes voted on by the committee, only eight received a majority vote. . . . The vote in the commission resulted in thirty-three ayes and eleven noes for *some* list of classes, and thirty-one ayes and thirteen noes for the proposed list." Hull, in 2 *A. J.*, 736 and n.

The Anglo-American project of *exclusive* obligatory arbitration was based on the prevailing type of treaty as concluded between France, Great Britian, the United States and other leading Powers. It provided that "differences of a legal nature and, primarily, those relating to the interpretation of treaties existing between two or more of the Contracting Nations, which may arise between them in the future and which cannot be settled by diplomatic means, shall be submitted to arbitration, on condition, however, that they do not involve the vital interests, independence, or honor of either of the said nations, and that they do not affect the interests of other nations not concerned in the dispute." (Each nation is its own judge as to whether the dispute falls within any of these of excepted categories.)

To this project there were added the eight classes of *inclusive* arbitration agreed to in committee. The whole project was adopted in commission by a vote of thirty-two against nine, with three abstentions. But since the opposition included Germany and Austria, it was dropped, much to the disgust of Mr. Choate, the head of the American delegation, who said: "The minority has been so feeble that one could almost count its number upon the fingers of a single hand."

On *Obligatory Arbitration at the Hague Conferences*, see André, *De l'arbitrage obligatoire* (1903); Higgins, *The Hague Peace Conferences*, 82–84; Holls, *Peace Conference*, 227–231; Hull, *The Two Hague Conferences*, 297–348; * *Ibid.*, in 2 *A. J.* (1908), 731–742; Fried, *Die zweite Haager Konferenz*, 39–119; Lamasch, in 4 (1910), 83–94; Lémonon, *La seconde conférence*, 121–187; Nippold, *Die zweite Haager Friedens-Konferenz* (1908), §§ 5-8; *Parl. Papers*, Misc. No. 4 (1908), 351–423; "Report of Baron Guillaume," in 1 *Actes et doc. de la deux. confer.*, 455–552; * 1 Scott, *The Hague Peace Conferences*, ch. 7; * *Ibid.*, *American Addresses at the Hague*, 34–68; Stoika, *L'arbitrage obligatoire*, chs. 2–3.

ments, may be submitted to compulsory arbitration without any restriction."[28]

But the Conference of 1907 went one step beyond this platonic declaration. It practically prescribed obligatory arbitration in one class of cases.

The so-called Porter Convention, or "Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts," declares:

"The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders a *compromis* impossible, or, after the arbitration, fails to submit to the award."[29]

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[28] F. A. (Final Act, 1907), Higgins, 67; or 2 Scott, 287.

[29] 2 H. C. (1907), Art. 1. *Cf. supra*, § 157.

By referring to the Table of Signatures appended to the Hague Conventions of 1907 (see Higgins, 530–531, or 2 Scott, 529), it may be noted that only thirty-four States had signed this Convention by June 30, 1908 — the final date set for signatures of their plenipotentiaries. Among the ten who did not sign are Brazil, China, and Venezuela. Many of the Contracting Powers signed under such reservations (see Higgins 191–193, 534–536, and 2 Scott, 533–535) as somewhat to weaken its force. Yet it may be regarded as binding upon nearly all the States of Europe and America.

By referring to the Table of Ratifications in 5 *A. J.* (1911), 769–770, it will be seen that only fourteen States had ratified this Convention, but these included most of the leading ones.

It may be noted that the so-called Porter Convention is at once broader and narrower than the famous Drago Doctrine — broader in that it includes public loans as well as ordinary contract debts, and narrower in that it does not absolutely forbid the used of force in the collection of public debts. It is narrower than the Calvo Doctrine, which forbids even diplomatic intervention as a means of collecting all pecuniary debts, except as a final resort. It should be observed that the Convention does not authorize or sanction the use of force in any case.

On the *Calvo and Drago Doctrines* (*cf. supra*, pp. 162–163 n.) and the *Porter Convention*, see especially: Barclay, *Problems in Int. Law and Diplomacy*, 115–122; 1, 3, and 6 Calvo, §§ 110, 185–206, 1280–1297, 256; *Drago, "State Loans," etc., in 1 *A. J.* (1907), 692–726; *Ibid.*, *Cobro coercitivo de duedas publicas* (1906); *Hershey, "The Calvo and Drago Doctrines," in 1 *A. J.* (1907), 26–45; *Higgins, *The Hague Peace Conferences*, 180–197; Lémonon, *La seconde conférence*, 97–120; *Moulin, *La doctrine de Drago* (with comprehensive bibliography); *Ibid.*, in 14 *R. D. I. P.* (1907), 417 ff.; Scott (G. W.), in 183 *No. Am. Review* (1906), 602–610; *Ibid.*, in 2 *A. J.* (1908), 78–94; *1 Scott (J. B.), *The Hague Peace Conferences*, ch. 8; and Vivo, *La doctrina Drago* (1911).

314. **The So-called Permanent Court of Arbitration at The Hague.** — The idea of a permanent International Court or Tribunal had long been a favorite theme with publicists.[30] It was at last partially realized in 1899, and some further improvements in its organization and procedure were effected in 1907.

The Convention for the Pacific Settlement of International Disputes of 1907 declares:

"With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the *Contracting* Powers undertake to *maintain the Permanent Court of Arbitration, as established by the First Peace Conference*, accessible at all times, and acting, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention. The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal."[31]

The following is the mode prescribed for the selection of arbitrators:

"Each Contracting Power selects four persons at the most, of known competency in questions of International Law, of highest moral reputation, and disposed to accept the duties of arbitrator. The persons thus selected are inscribed, as members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.[32] . . . The members of the Court are appointed for a term of six years. Their appointments are renewable."[33]

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[30] For a history and development of this idea, see especially the remarkable works of Kamarowsky, *Le tribunal international* (1887); Mérignhac, *L'arbitrage int.* (1895); and Descamps, in 28 *R. D. I.* (1896), 5–75. The latter's "Essai sur l'organization de l'arbitrage international" appears to have made a particularly favorable impression on the conference of 1899 amongst the documents of which it lies incorporated.

[31] 1 H. C. (1907), Arts. 41 and 42. *Cf.* 1 H. C. (1899), Arts. 20 and 21. The phrase set in *italics* was added in 1907.

[32] An *International Bureau* was created to serve as registry or record office for the Court. "It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business. . . ." 1 H. C. (1907), Art. 43. See also Arts. 46–50, and 63.

"The *Permanent Administrative Council*, composed of the diplomatic representatives of the Contracting Powers accredited to the Hague and of the Netherland Minister for Foreign Affairs, who acts as President, is charged with the direction and control of the International Bureau." *Ibid.*, Art 49.

[33] 1 H. C. (1899), Art. 44. *Cf.* 1 H. C. (1899), Art. 23.

When the Contracting Powers desire to have recourse to the so-called Permanent Court for the settlement of a particular difference, they must choose arbitrators from this list.[34]

"Failing the agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

"Each party appoints two arbitrators, *of whom one only can be its national or chosen from among the persons who have been selected by it as members of the Permanent Court.* These arbitrators together choose an umpire. If the votes are equally divided, the choice of the umpire is intrusted to a third Power, selected by agreement between the parties. If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

"*If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Which of the candidates thus presented shall be umpire is determined by lot.*[35]

315. **The Hague Code of Procedure.** — The Hague Conference of 1899 also formulated quite an elaborate code of procedure, modeled largely on that adopted by the Institute of International Law in 1875,[36] consisting of twenty-eight articles. It was revised and considerably enlarged in 1907,[37] and a short code

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"The members of the tribunal, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities." 1 H. C. (1899 and 1907), Arts. 28 and 46.

[34] For a list of members of the Court in 1910, see Supplement to 4 *A. J.*, 264–278.

[35] 1 H. C. (1907), Art. 45. The *italicized* portions of this article were added in 1907. *Cf.* 1 H. C. (1899), Art. 24.

[36] See *Tableau général*, 124–132; or 1 *Annuaire*, 45, 84, 126.

[37] 1 H. C. (1907), Arts. 51-85. *Cf.* 1 H. C. (1899), Arts. 50–57.

"Unless the *compromis* has specified the languages to be used, the question shall be decided by the Tribunal." Art. 61.

"Art. 37 of the Convention of 1899 left it to the absolute discretion of the parties to employ such agents and counsel as they wished. This freedom seems to have been abused by some of the parties in employing as counsel members of the Hague Tribunal itself, thus inviting severe criticism in some quarters. In view of this danger, the German amendment to Article 62 was adopted: 'The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.'" Hershey, in 2 *A. J.*, 45.

for arbitration by a more summary procedure added.[38] Thus, the nations are freed from the necessity of framing rules of procedure for each and every controversy.

316. **Defects of the Hague Tribunal or Court of Arbitration.** — Though this so-called Permanent Court of Arbitration is a great step in advance, its constitution and organization are obviously very defective. In the first place it is not even a Court, but rather a panel or list of judges. The so-called Court is wanting in cohesion, continuity, and independence. Litigation is slow and expensive. During the period between the meeting of the two Hague Conferences of 1899 and 1907, the Hague Tribunal or Court of Arbitration was only called into existence upon four occasions.[39]

This article is still objectionable as it stands. Members of the Court should have been excluded altogether from service as counsel, as the United States proposed. 1 Scott, 294.

Discussions are to be "public, if it be so decided by the Tribunal, with the assent of the parties." Art. 66.

"The deliberations of the Tribunal take place in private and the *proceedings remain secret.* All questions are decided by a majority of the members of the Tribunal. The award must state the reasons on which it is based." Arts. 78 and 79. "Each party pays its own expenses and an equal share of those of the Tribunal." Art. 85.

On the *Convention for the Pacific Settlement of International Disputes*, see 1 *Actes et doc. de la deux. confér.*, 399–454; Barclay, *Problems*, etc., 9–45, 191; Descamp, in 32 *R. D. I.* (1900), 117, 270, 353, 498; Hershey, in 2 *A. J.* (1908), 29–49; Higgins, *The Two Hague Conferences*, 95–179; Holls, *The Peace Conferénce*, ch. 5; Hull, *The Two Hague Conferences*, 267 ff.; Lémonon, *La seconde conference*, 69 ff.; 1 Mérignhac, *Traité*, 54 ff.; Meurer, *Die Zwiete Haager Friedenskonferenz*, Teil I; 1 *Ibid.*, *Die Haager Friedenskonferenz* (1905); 3 Nys, § 12; *Ibid.*, in 8 *R. D. I.* (2d series), 5 ff.; 2 Oppenheim, §§ 19–25; *Parl. Papers*, Misc. No. 4 (1908), 302–351; 1 Scott, *The Hague Peace Conferences*, ch. 6.

[38] 1 H. C. (1907), Arts. 86–90. "Each of the parties at variance appoints an arbitrator. The two arbitrators thus selected choose an umpire. . . . " Art. 87. This procedure is designed to aid in the solution of disputes of a special or technical character. It is more simple, rapid and inexpensive.

[39] 1. The first case was that of the *Pious Fund of the Californias*. It supports the important principle of *res judicata* in public law. For the protocol and text of the award, see 2 *A. J.* (1908), 893–902. See also 1 Cobbett, 23–27.

2. The *Claims* v. *Venezuela* (1904) for preferential treatment on the part of Great Britain, Germany, and Italy, who had blockaded Venezuelan ports and thus obtained a recognition of their claims. The Tribunal decided in favor of these claimants over against those who had not used force, thus establishing an unfortunate precedent in favor of the use of force in such cases. The decision is bad both in law and morals. For the protocols and text of this award, see *op. cit.*, 902–911. See also Mallarmé, in 13 *R. D. I. P.* (1906), 432 ff.; and Moore, *Digest*, § 967.

3. The *Perpetual Leases of European Powers in Japan* (1905). *Held* that these leases exempt the lands and all buildings constructed on them from "all imposts,

The formation of a system of international jurisprudence by such means is manifestly impossible.

317. **The Proposed Court of Arbitral Justice.** — To remedy these defects and provide the nations with a real Permanent Court for the settlement of judicial disputes, the second Hague Conference, mainly through the efforts of the American delegation, attempted to create a so-called "Court of Arbitral Justice." But their labors were only partially successful. A Draft Convention providing for the organization, jurisdiction, and procedure of such a Court was elaborated and readily adopted in plenary session,[40] but the Conference was unable to agree upon a mode of selection for the appointment of judges.[41]

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taxes, charges, contributions, or conditions whatsoever other than those expressly stipulated in the leases in question." 2 *A. J.* (1908), 911–921.

4. The *Muscat Dhows Case* (1905), which is unimportant. See 2 *A. J.* (1908), 923 ff., and Bressonnet, in 13 *R. D. I. P.*, (1906), 145 ff.

On these cases generally, see Higgins, *op. cit.*, 44–50; 1 Mérignhac, *Traité*, 558–574; 1 Scott, 312 ff.; Smith and Sibley, 280–283.

There have been several additional decisions rendered by the Hague Tribunal since 1907. On the *Casablanca Incident* (which involved a trivial but dangerous controversy between France and Germany, growing out of alleged aid given to foreign deserters from the French legation in Morocco by the German Consul), see 3 *A. J.* (1909), 176–178, 698–701, 755–760, 946; and Gidel, in 17 *R. D. I. P.* (1910), 326–407.

This case is particularly interesting inasmuch, as in the solution of the North Sea Incident (see *supra*, pp. 326–327 n.), the arbitrators were empowered to decide the questions of fact as well as those of law. The decision appears to have been a Scotch verdict. The German consulate committed "a grave and manifest error," but it was not held responsible.

Other important cases decided since 1907 have been those of the *North Atlantic Coast Fisheries* (1910), in 4 *A. J.*, 948–1000, 5 *Ibid.*, 1–35; *The Orinoco Steamship Co. Case* (1910), 5 *Ibid.*, 35–65, 230–235; and the *Savarkar Case* (1911), 5 *Ibid.*, 208–210, and 18 *R. D. I. P.* (1911), 303 ff.

[40] Upon the final vote, there were thirty-six yeas and six abstentions. A number of States made reservations to the effect that the principle of the legal equality of States be recognized in the composition of the Court. Higgins, 517.

[41] There were three methods of selection proposed: (1) A system of rotation practically identical with that adopted for the International Prize Court (see *infra*, § 528). This plan was proposed and ably defended by Messrs. Choate and Scott of the American delegations. According to the revised American project, the judges (seventeen in number) were to represent the leading nations, main languages, and the various judicial systems of the world. The eight leading nations or World Powers (Great Britain, the United States, Germany, Russia, Japan, France, Austria-Hungary, and Italy) were to be represented by judges sitting during their full term of appointment for twelve years, the judges from the lesser States sitting in rotation for periods varying from one to ten years. See Table, in 1 Scott, 823–825.

This Project was annexed to the following wish expressed by the Conference:

"The Conference calls the attention of the Signatory Powers to the advisability of adopting the annexed draft Convention for the creation of a Judicial Arbitration Court, and of bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court."[42]

The Proposed Judicial Arbitration Court is to be "composed of judges representing the various judicial systems of the world, and capable of insuring continuity in arbitral jurisprudence." The judges and deputy judges shall be "chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of International Law." They shall be appointed for a term of twelve years.[43]

"The Court annually nominates three judges to form a special Delegation and three more to replace them if the former are

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This plan encountered the unyielding opposition of the smaller States, headed by their vigorous champion, M. Barbosa, head of the Brazilian delegation.

(2) A system based upon the idea of the absolute equality of States proposed by Brazil. According to this project (which was not seriously considered), there were to be as many judges as there are States, *i.e.* forty-six judges divided into three groups, each group to sit by rotation during a period of three years.

(3) A system of election proposed by the United States. According to this plan, each State was to select a candidate whose name should be sent in to the International Bureau at The Hague. This Bureau should then transmit a list of the forty-six persons thus designated to the Minister of Foreign Affairs of each country, with the request that he check the names of fifteen of the candidates. Those receiving the highest number of votes were to form the Court during a period of twelve years. This system, which would appear to meet the tests both of equality and sovereignty, was, however, objectionable to the smaller as well as to the larger States.

For a discussion of these various systems, see especially 2 Scott, 457-459.

[42] F. A. (Final Act) of H. C. (1907), in Higgins, 67-69; 2 Scott, 289; or Whittuck, 88. On Oct. 18, 1900, Secretary Knox suggested to the Powers that the International Prize Court be invested with the functions of a Court of Arbitral Justice.

[43] D. C. (Draft Convention) of H. C. (1907), Arts. 1-3. See Higgins, 498 ff.; 2 Scott, 291 ff.; or Whittuck, 220 ff.

It should especially be noted that the proposed Court shall be "without derogation" to the Hague Tribunal or so-called Permanent Court of Arbitration. It appears to have been the idea of its promoters that the new Court, "though competent to deal with all cases submitted to it" (Art. 17), would be particularly adapted to the trial of purely *judicial* disputes, and that the Hague Tribunal might serve for the settlement of political differences capable of such settlement.

unable to act." This election is by ballot and plurality vote.[44] The judges are to receive an annual salary of 6000 Netherland florins (nearly $2400), together with a further allowance of 100 florins per diem when in the exercise of their duties, and traveling expenses.[45]

"The Court meets in session once a year. The session opens on the third Wednesday in June and lasts until all the business on the agenda has been transacted."[46]

The Delegation is competent: (1) To decide all cases of arbitration submitted to it. (2) To perform the functions of a Commission of Inquiry. (3) To settle the *compromis* if the parties so agree (or even at the request of one of the parties in certain cases).[47]

318. **The Finality of the Award in Arbitration.** — It is generally agreed that an arbitral award, properly made and duly pronounced, is final and binding, unless otherwise stipulated in the agreement (*compromis*).[48] But there are certain conditions

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[44] D. C., Art. 6. This idea of a Delegation was proposed by Russia.

[45] *Ibid.*, Art. 9. "These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau. . . ."

[46] Art. 14. But "the Court does not meet in session if the Delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session be held. When necessary, the Delegation may summon the Court in extraordinary session."

[47] D. C., Arts. 17–19. *Cf.* 1 H. C. (1907), Arts. 52–54. "Each of the parties concerned has the right to nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the Delegation. If the Delegation acts as a Commission of Inquiry, this task may be intrusted to persons other than the judges of the Court." Art. 20.

For rules of procedure, see Arts. 22–30. In general, the rules of 1 H. C. are to be followed. See *supra*, § 315.

On the proposed *Court of Arbitral Justice*, see 1 and 2 *Actes et doc. de la deux. confér.*, 332–335, 347–398, 144–161, 309–325, 331–351, 596–630, 1031–1070; Fried, *Die zweite Haager Konferenz*, 98–119; Higgins, *The Hague Peace Conferences*, 498–517; Hull, *The Two Hague Conferences*, 410–426; Lémonon, *La seconde conférence*, 220–279; Nippold, *Die zweite Haager Friedens Konferenz*, 1. Teil, *Das Prozessrecht* (1908), § 9; *Scott, *The Hague Peace Conferences*, ch. 9; *Ibid.*, in 2 *A. J.* (1908), 772–810; *Ibid.*, *American Addresses*, etc., 77–111.

[48] "The award, duly pronounced and notified to the agents of the parties, settles the dispute definitely and without appeal. Any dispute arising between the parties as to the interpretation and execution of the award shall, in default of agreement to the contrary, be submitted to the decision of the Tribunal which pronounced it. The parties may in the *compromis* reserve the right to demand the revision of the award." 1 H. C. (1907), Arts. 81–83. See Art. 83 for the conditions under which the demand for a revision of the award may be made.

under which an arbitral verdict is not binding, *e.g.* if the arbitrators have been bribed or coerced, if they have exceeded their instructions, or in case of fraud.[49]

319. **The Scope of Arbitration.** — There has been much controversy as to the possible scope of arbitration. Theoretically this method is applicable to any international difference, but practically it is much easier of application in the settlement of disputes of a legal nature.[50]

It is customary, in treaties of arbitration, to exclude questions involving national honor,[51] vital interests,[52] or independence,[53] as also questions affecting the interests of third Powers.[54] The

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In the case of *La Ninfa* (1896), 75 Fed. 513, and Scott, *Cases*, 443, it was held that an arbitral award "is to be construed as a treaty which has become final. A treaty, when accepted and agreed to, becomes the supreme law of the land. It binds courts as much as an Act of Congress."

[49] There have been comparatively few cases in which arbitral awards have been set aside or even seriously questioned. For some instances of improper awards, see Clarke, in 1 *A. J.* (1907), 361 ff. See also 6 Moore, *Digest*, §§ 1081–1083.

On *Les sanctions de l'arbitrage int.*, see Dumas (1905).

[50] This view obtained official recognition at The Hague Conferences.

"In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. *Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the Contracting Powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit.*" 1 H. C. (1907), Art. 38. The *italicized* part of this article was added in 1907.

[51] There is a growing sentiment in favor of admitting so-called questions of "honor" to arbitration. Indeed, there is no sound reason for excluding them. They are of a nature particularly susceptible of arbitration when diplomacy or mediation fails.

[52] The phrase "vital interests" is nowhere adequately explained. But the fact that it is vague does not prove that the difficulty is not a real one. It of course refers to questions of a far-reaching political, economic, or social character. Illustrations may be found in the various applications of the Monroe Doctrine, or in a study of such recent wars as those between Russia and Japan, and Spain and the United States. Fundamental racial differences may also be involved.

[53] Mérignhac (*De l'arbitrage int.*, Nos. 188–193) points out that the exclusion of questions relating to integrity and independence is not in the interest of the smaller States. He only admits exceptions to the practicability of arbitration in two cases: in case of differences between a civilized and a barbarous nation, and between an established government and insurgents.

[54] A typical treaty is that between France and the United States (1908).

"Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of

Arbitration established at The Hague by the Convention of July 29, 1899, *provided*, nevertheless, they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third parties." Art. 1. For text, see 2 Supplement to *A. J.* (1908), 296. For nine such treaties, see *Ibid.*, 296–336.

A very interesting attempt to evade or solve the difficulties encountered by the "honor" and "vital interests" problems is that presented by Art. I of the draft of a treaty recently (1911), negotiated between Great Britain and the United States, but mutilated by the Senate in 1912. A similar treaty was negotiated with France.

"All differences hereafter arising between the High Contracting Parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the High Contracting Parties are concerned by virtue of a *claim of right* made by one against the other, under treaty or otherwise, and which are *justiciable* in their nature by reason of being susceptible of decision by the *application of the principles of law and equity*, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other arbitral tribunal, as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder (Art. I, par. 1). . . .

"The High Contracting Parties further agree to institute, as occasion arises, and as hereinafter provided, a *Joint High Commission of Inquiry*, to which, upon the request of either party, shall be referred, for impartial and conscientious investigation, any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them, even if they are not agreed that it falls within the scope of Article I; *provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor*, in order to afford an opportunity for diplomatic discussion and adjustment of the question in controversy, if either party desires such postponement.

"Whenever a question or matter of difference is referred to the Joint High Commission of Inquiry, as herein provided, each of the High Contracting Parties shall designate three of its nationals to acts as members of the Commission of Inquiry for the purpose of such reference; or the Commission may be otherwise constituted in any particular case by the terms of reference, the membership of the Commission and the terms of reference to be determined in each case by an exchange of notes (Art. II, par. 1). . . .

"The Joint High Commission of Inquiry, instituted in each case as provided for in Article II, is authorized to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate.

"The reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either of the facts or on the law, and shall in no way have the character of an arbitral award.

"It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the Commission agree and report that such difference is within the scope of Article I; it shall be referred to arbitration in accordance with the provisions of the treaty (Art. III)."

States themselves are of course the judges as to whether the dispute falls within any of these categories. A few of the smaller States have agreed to arbitrate *all* their differences.[55]

320. **Is a State under an Obligation to Arbitrate?** — Aside from treaty stipulations, there is, in general, no legal obligation resting upon States to arbitrate their differences.[56] But they are morally bound to employ every possible amicable mode of redress of grievances before resorting to the use of force, and they are probably legally bound to have recourse to negotiation.[57]

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For the full text of this interesting and important attempt to minimize the danger of war, see Supplement to 5 *A. J.* (1911), 253 ff. For discussion, see 6 *A. J.* (1912), 167 ff.

[55] *E.g.* Denmark and Holland. Brazil and the Argentine Republic agree to submit to arbitration all controversies in so far as they "do not turn upon questions involving constitutional rules of the one or the other of the two countries." Supplement to 3 *A. J.* (1910), 1–4, Art. I.

Norway and Sweden have agreed to submit to The Hague Court questions as to whether the disputes involve vital interests. In 1902 the Argentine Republic and Chili bound themselves to submit all controversies except those affecting the Constitution of either country. 1 *Ibid.*, 290.

[56] There would seem to be an exception in case of a claim for the collection of contract debts. But only the creditor State is bound to offer arbitration by the terms of the Porter Convention on this subject. The debtor State has the alternative of acceptance or refusal. In the latter case, the creditor nation may employ force. 2 H. C. (1907), Art. 1. *Cf. supra*, § 313.

[57] So, at least, thinks Oppenheim, II, § 3. And this view appears to be borne out by international practice. The so-called *duty* article of the Convention of 1899 declared: "The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them to remind these latter that the Permanent Court is open to them. . . ." The Conference of 1907 added: "In case of a dispute between two Powers, one of them may always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration. The Bureau must at once inform the other Power of the declaration." 1 H. C. (1899 and 1907), Arts. 27 and 48.

It has been well said that this article provides for a sort of appeal to the Hague Tribunal, but it does not make arbitration in any sense obligatory. For discussion and a very interesting comment by Baron d'Estournelles de Constant, see Hershey, in 2 *A. J.* (1908), 42–43.

342–408; 1 Cobbett, *Cases* (3d ed.), 23–41; Coudert, *Addresses* (1905), 3 ff.; Creasy, 394–399; Crucé, *The New Cyneas* (ed. and tr. by Balch, 1909); * Darby, *Int. Tribunals* (4th ed., 1904), 767–917 for instances of arbitration; * Descamp, *Essai*, etc. (1896); *Ibid.*, in 28 *R. D. I.* (1896), 5–76; Despagnet, *Cours*, Nos. 697–713; Dreyfus, *L'arbitrage int.* (1892); * Dumas, *Les sanctions de l'arbitrage int.* (1905); Duplessix, *L'organization int.* (1909); 2 Fiore, Nos. 1202–1215; *Ibid.*, in 30 *R. D. I.* (1898), 5 ff.; Foster, *Arbitration and The Hague Court* (1904); * Fried, *Die moderne Schiedsgerichtsbewegung* (1904); *Ibid.*, *Die moderne Friedensbewegung* (1907); *Ibid.*, *Die zweite Haager Konferenz* (1908); Gareis, § 78; Grotius, II, c. 23, § 8; Hall (Atlay's 6th ed.), 354–360; 1 Halleck (Baker's 3d ed.), 102–103, 467–468, 485–487; Heffter (Geffcken), § 109; * Higgins, *The Hague Peace Conferences* (1909), see index; * Holls, *Peace Conference* (1900), see index; Hull, *The Two Hague Peace Conferences* (1908), 267–427, 470–477, 490–495; Interparliamentary Union, *Reports* of, since 1892; * Kamarowsky, *Le tribunal int.* (1887); Lake Mohonk Conference, *Reports on International Arbitration since 1895;* Lafontaine, *Bibliographie de la paix et de l'arbitrage international* (1904); *Ibid.*, in 34 *R. D. I.* (1902), 349 ff., 558 ff., 623 ff.; Lapradelle et Politis, *Recueil*, etc., I (1798–1855), in 1900; Lapradelle, "La Conference de la Paix," in 6 *R. D. I. P.* (1899), 651–846 (see p. 651 for bibliography); *Ibid.*, in 16 *R. D. I. P.* (1900), 385 ff. (see pp. 385–387 for bibliography); Laveleye, *Des causes actuelles de la guerre et de l'arbitrage* (1873); Lawrence, *Essays*, 234–277; *Ibid.*, *Principles* (3d ed.), §§ 241–242; *Ibid.*, *Principles* (4th ed.), § 221; *Ibid.*, *International Problems and Hague Conferences* (1908), 62–82; Lémonon, *La seconde confér.*, 95–279; Liszt (3d ed.), § 38; Maine, *Int. Law*, 211–228; 3 F. de Martens, § 104; *Ibid.*, *La conference*, etc. (1900); * Mérignhac, *De l'arbitrage int.* (1895); 1 *Ibid.*, *Traité*, 448–574; *Ibid.*, *La conférence de la paix* (1900); 1 Meurer, *Die Haager Friedenskonferenz* (1905–1907); *Ibid.*, *Die Zweite Haager Friedenskonferenz* (1908); * Moch, *Histoire sommaire de l'arbitrage* (1905); * Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, in 6 vols. (1898) (see especially note on pp. 4821 ff. for a translation from Mérignhac on "The History of Arbitration"); * 7 Moore, *Digest*, §§ 1069–1089; *Ibid.*, in 22 *Annals of Amer. Acad.* (1903), 35–44; *Ibid.*, in *American Diplomacy*, 200–220; *Ibid.*, in 6 Papers of *American Historical Assoc.* (1891), 63–85; De Mougins de Roquefort, *De la situation juridique des conflits int.* (1899); National Peace Congresses, *Proceedings of*, since 1908; * Nippold, *Die Fortbildung des Verfahrens in völkerrechtliche Streitskeiten* (1907); *Ibid.*, *Die Zwiete Haager Friedenskonferenz*, I Das Processrecht (1908); Novicow, *La fédération de l'Europe* (1901); 3 Nys, 62–82; *Ibid.*, in 38 *R. D. I.* (1906), 5 ff.; * 2 Oppenheim, §§ 12–25; 2 Piédelièvre, Nos. 679–758; 3 Phillimore, §§ 3–5; Phillipson, *Two Studies in Int. Law* (1908), 1–49, 118–127; * 6 P.-Fodéré, Nos. 2602–2630; Quesada, *Arbitration in Latin America* (1907); Ralston, *Int. Arbitral Law and Procedure* (1911); Revon, *L'arbitrage int.* (1892); 2 Rivier, 166–188; Rouard de Card, *L'arbitrage int.* (1877); *Ibid.*, *Les destinées de l'arbitrage* (1892); Rolin-Jacquemnys, *De l'arbitrage* (1883); Scott, *Cases*, 443–449; * 1 *Ibid.*, *The Hague Peace*

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CHAPTER XXII

NON-AMICABLE OR FORCIBLE MODES OF SETTLEMENT OF INTERNATIONAL DISPUTES

THERE are at least six non-amicable methods of settling international disputes. These may also be considered as modes of self-help.

321. (I) **Retorsion.** — *Retorsion* is a species of retaliation in kind. It consists in treating in the same or similar manner a foreign State or its subjects chargeable with acts which, though perhaps not illegal,[1] are discourteous, unfair, offensive, or otherwise injurious. It is usually applied by way of retaliation for discriminatory legislation or administrative action, such as hostile tariffs, exclusion or unfair treatment of foreigners of a particular nationality, or denial of civil rights to aliens. Retorsion is essentially a remedy for political, racial, or economic grievances, and should be used as a means of securing fair and honorable treatment rather than from motives of punishment or vengeance.[2]

322. (II) **Reprisals.** — *Reprisals*,[3] are general retaliatory measures for violations of law or international delinquencies, more particularly denials of justice.[4] They consist in such acts as the

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[1] Oppenheim (II, § 20) maintains that retorsion can only be applied as a remedy for *political* differences. It is difficult to see why it cannot be applied to legal differences as well, though it is true that these should always be settled by arbitration, if possible. For a view contrary to that of Oppenheim, see 2 Westlake, 6.

[2] Examples of retorsion may be found in 7 Moore, *Digest*, § 1090.

[3] Reprisal in time of peace should not be confounded with reprisals in time of war. *Cf. infra*, § 337.

[4] On the "Responsibility of a State for International Delinquencies," see *supra*, ch. 10.

Reprisals were formerly classified as general and special, but special reprisals are obsolete. Down to the end of the eighteenth century States frequently issued licenses or "Letters of Marque and Reprisal" to such of their subjects as had been injured abroad, authorizing them to indemnify themselves upon the property of the subjects of the offending State. These were called special reprisals.

All reprisals are now, in a certain sense, *general* in character, and since the aboliseizure at sea or on land of vessels or other property of a foreign State or its subjects as a means of securing redress or indemnity for an alleged wrong. They may take the form of a temporary occupation of a port, the seizure of customs duties,[5] or the institution of a pacific blockade.

Reprisals are *prima facie* acts of war, but they are not necessarily so intended by the State executing them, nor need they be so regarded by the State against which they are carried into effect. They furnish a rough means of obtaining redress for injuries of lesser importance in cases where all attempts at an amicable settlement have failed, or of putting stress upon a weak but obstinate State. They can and should be limited to the seizure and sequestration of vessels or goods belonging to the offending State, and the rights and property of individuals should be respected as much as possible.

This mode of self-help should not be resorted to until all diplomatic means of securing redress have been exhausted, and reprisals should bear some proportion to the magnitude of the injury suffered and the amount of force necessary to obtain reparation. They are becoming more and more infrequent, and we may confidently look forward to the day when arbitration shall have wholly supplanted this crude and barbarous method of settling international differences.[6]

323. (III) **Embargo.** A special form of reprisal is that of *hostile embargo*,[7] which consists in the sequestration of property

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tion of privateering, are executed by the State or government itself. They may or may not be anticipatory of war. Reprisals are still classified by most authorities as *positive* and *negative*, but the distinction has little, if any, practical value.

[5] For example in 1895 Great Britain seized the port of Corinto in Nicaragua, and in 1901 France seized a portion of the island of Mitylene.

[6] For examples illustrating the use and abuse of reprisal, see 3 Calvo, §§ 1812 ff.; Hall (6th ed.), 362 f.; * 7 Moore, *Digest*, § 1096; 2 Oppenheim, §§ 34, 35, 37; 3 Phillimore, §§ 21–23; * Scott, *Cases*, 451–465; Snow, *Cases*, 243–251. The most famous cases are: *Great Britain* v. *The Two Sicilies* (1840), Hall, 363, 2 Oppenheim, § 34, and 3 Phillimore, § 23; *The Silesian Loan* (1752), 1 Cobbett, 344, 2 Martens, *Causes célèbres*, 97, 3 Phillimore, § 22, and Snow, *Cases*, 243; and the case of *Don Pacifico* (1850), 7 Moore, § 1096, 2 Oppenheim, § 35, 3 Phillimore, § 23, and Snow, 246. The latter case was certainly a gross abuse of the right of reprisal by Great Britain.

A very interesting judicial opinion is that of Judge Davis, in *Gray* v. *U. S.* (1886), 21 Court of Claims, 340, and Scott, 452.

[7] The term "hostile embargo" is used to distinguish this form of embargo from civil or pacific embargo — the detention by a State of its own vessels in port.

(usually vessels) of the offending State in the ports of the embargoing State. If a hostile embargo is followed by war, its commencement has a retroactive effect, and the vessels seized may be confiscated as enemy property.[8]

324. (IV) **Pacific Blockade.** — *Pacific blockade*[9] is the blockade of the ports of a foreign State in a time of peace without the intention of waging war. The instances of its application have been so frequent since its first employment in the early part of the nineteenth century,[10] that it may be regarded as an established institute of the Law of Nations.[11]

325. **The Law of Pacific Blockade.** — The law of pacific blockade is perhaps best expressed by the rules adopted by the Institute of International Law in 1887:

"The establishment of a blockade without war cannot be considered as permitted by International Law except under the following conditions: (1) Ships under a foreign flag can enter freely notwithstanding the blockade. (2) The pacific blockade must be officially declared and notified, and maintained by a sufficient force. (3) The ships of the blockaded Power which do not respect such a blockade may be sequestered. When the blockade has ceased they must be restored to their owners with their cargoes, but without indemnity on any ground." [12]

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[8] So held by Lord Stowell in the case of *The Boedus Lust* (1803), 5 C. Rob. 245 and Scott, 460. It would seem that this same principle applies to captures at sea by way of reprisal, if not to reprisals generally. See 2 Westlake, 10 and notes

It is customary — a custom sanctioned by one of the Hague Conventions — to allow a certain time for the departure of foreign merchant vessels found in an enemy port at the outbreak of war. See *infra*, §§ 347–348.

[9] Pacific blockade is generally regarded as a form of reprisal, but it has also been used as a form of intervention or an act of international police, *e.g.* in Crete.

[10] The instances are about twenty in number. The first case cited in the treatises is that connected with the intervention of the Powers in favor of Greece against Turkey in 1827, but recent researches have unearthed a still earlier example, viz. the Anglo-Swedish blockade of Norwegian ports in 1814. See Söderquist, 60 ff., 282 ff.; and Staudacher, 32–34.

Since 1827, the most important and interesting instances of pacific blockade have perhaps been the following: The blockade of Greek ports by Great Britain in 1856; that of the island of Formosa by France in 1884; the intervention in Greece by the Powers in 1886; that directed against Crete in 1897; and the Venezuelan Case in 1902.

For historical instances, see especially: 3 Calvo, §§ 1833 ff.; Hall (6th ed.), 364, ff.; * Hogan, 73–183; Holland, *Studies*, 134 ff.; 7 Moore, § 1097; Söderquist, 60 ff.; Staudacher, 22–114.

[11] Among leading authorities who condemn pacific blockade are Bonfils, Despagnet, Fauchille, Geffcken, Hautefeuille, Kleen, F. de Martens, and P.-Fodéré.

Among those who justify this institution, with or without proper limitations, are Bluntschli, Bulmerincq, Calvo, Cauchy, Fiore, Hall, Heffter, Lawrence, Oppenheim, Perels, Rivier, Rolin-Jacquemyns, Westlake, and the Institute of International Law.

326. **May Neutral Commerce be Interfered with?** — Among those publicists who admit the validity of pacific blockade, the main controversy has centered around the question whether the commerce of third Powers may be interfered with or their vessels seized and sequestered. International practice has varied considerably in regard to this matter,[13] but the great majority of authorities agree [14] that there is no obligation resting upon third States to respect such a blockade. Inasmuch, however, as this mode of self-help is a much milder remedy than war, and does not impose the burdens of neutrality, it may well be that third States sometimes acquiesce as a matter of policy and do not insist upon their full rights in the premises.[15]

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[12] As translated by 2 Westlake, 16. For the French text, see 9 *Annuaire* (1887), 300, or *Tableau*, 133.

Emphasis should be placed upon the fact that the penalty for violation of pacific blockade is detention or sequestration. In no case should vessels be confiscated. If they resist capture, they may of course be injured or destroyed in the course of the struggle. This rule has been generally observed in practice, though there are several instances of its violation.

[13] Prior to 1850 the commerce of third States was frequently interfered with. During the blockades of Greece in 1850 and 1886, only Greek ships were excluded. In the Cretan blockade of 1897, non-Greek vessels were interfered with under certain circumstances. In 1884 France tried to enforce her blockade of Formosa against third States, but was forced to recognize a state of war with China, owing to the opposition of Great Britain. In 1902 the allied Powers enforced their blockade of Venezuelan ports against third States. The United States stated, however, that it adhered to its position in the case of the Cretan blockade of 1897, and did "not acquiesce in any extension of the doctrine of pacific blockade which may adversely affect the rights of States not parties to the controversy, or discriminate against the commerce of neutral nations." 7 Moore, *Digest*, § 1097, p. 140.

It is extremely doubtful whether the Venezuelan blockade of 1902 can be regarded as a pacific blockade. Great Britain seems to have regarded it as a war blockade from the first, and Germany performed acts which can scarcely be reconciled with the idea of a pacific blockade. Hogan (p. 51 and n.) mentions six pacific blockades in which the vessels of third States were not seized or detained.

[14] Exceptions to this rule are Bulmerincq, Heffter, Perels, and Staudacher. See Hogan, 52–53, for citations from the authorities on this point.

[15] I agree with Westlake (II, 17) on this point: "As the matter stands, it would be difficult to characterize the pacific blockader who sequestered quasi-neutral ships as a wrongdoer in an opprobrious sense, but it would be equally difficult to deny to the quasi-neutral the right of refusing to submit to the measure."

327. (V) **Intervention.** *Intervention* — a mode of action which has already been discussed,[16] and which may be employed as a means of self-help or of political action in general.

328. (VI) **War.** *War* — the final resort (*ultimo ratio*) after all other means of securing redress have failed.[17]

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[16] See *supra*, ch. 5, §§ 135–145.

[17] There are several non-amicable or forcible modes of showing a strong sense of disapproval, obtaining redress, or preventing an anticipated injury or attack which have not been indicated in the text. Such are the following: (1) A breach of diplomatic relations — a form of protest which usually indicates very strained relations and may be followed by war. (2) The passage of non-intercourse acts, such as were directed by the United States against France and England respectively in 1798 and 1809. (3) A display or limited use of force, *i.e.* a naval or military demonstration as a threat or form of constraint to insure the observance of alleged international rights or performance of duties. Such use or display of force may readily develop into intervention or war. For examples, see 7 Moore, *Digest*, § 1091.

On these modes of protest see, in general: Moore, §§ 1089, 1091–1093, 1099; 6 P.-Fodéré, No. 2633; Taylor, §§ 433–434, 441; Wharton, *Digest*, § 321; Wilson, §§ 88, 92–93.

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PART V

THE LAW OF WAR

CHAPTER XXIII

THE CAUSES, CHARACTERISTICS, AND FUNDAMENTAL PRINCIPLES OF WAR

329. **Definition of War.** — War, in a material sense, is a struggle or contention between States and belligerent or insurgent communities through organized armed forces. In a legal sense, war is the status or condition under which such a contest is carried on, and consists of the rules by which it is regulated.[1]

330. **War a Political Fact rather than a Legal Right.** — War is a political fact recognized and, to a certain extent, regulated by the Law of Nations; but, though the source of legal rights and duties, it is not a *right* in the ordinary legal sense of this term. Like intervention,[2] for example, war is an exercise of sovereign or high political power — a right inherent in sovereignty itself. The State which goes to war performs a political act, whether from pure political motives or as a means of self-help, after all attempts to arrive at an amicable mode of settlement have failed.[3]

331. **Causes of War.** — Wars have been due to various and manifold causes.[4] They are partly psychological and in part

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[1] For various definitions of war, see 4 Calvo, § 1864; and 6 P.-Fodéré, No. 2650. Ever since the days of Gentilis (who defined war as a "contention") and Grotius (who described it as a "condition"), authorities have differed on this point. As in the case of some other controversies of a similar nature, the truth is that both sides are in the right.

[2] *Cf. supra*, § 145.

[3] War is not a mere means of execution or self-help, as claimed by some publicists, though a particular war may possibly have these motives. Such a claim is likely, however, to be more of a pretense than a reality. As a means of execution or self-help, the remedy is entirely too dangerous and drastic. With modern facilities for settling international differences, it is seldom that nations need have recourse to war in order to settle their legal controversies.

[4] In his history of the Hannibalic War, Polybius (III, 6) carefully distinguishes

social, economic, or political in origin. "They have their root in human nature, in the passions, appetites, aversions, and ambitions of mankind; and in the economic, political, or social conditions under which men seek for the means of existence and enjoyment. On the one hand, we have to reckon with certain human factors, such as hunger, greed, national jealousy, racial aversion, love of glory or national vanity, and a desire to gratify these passions; and on the other hand, man is often confronted with conditions in his physical, political, or social environment which make it difficult to gratify these desires without a resort to violence. . . ."[5]

"Modern wars seem to be due mainly to eight causes: (1) The desire for commercial and colonial expansion (examples: the recent struggle in the Far East between Japan and Russia for the control of Manchuria and Korea, and most of the petty wars which Great Britain has waged in Asia and Africa during the past century). (2) The desire to secure or maintain political or racial supremacy in certain quarters of the globe (examples: the Spanish-American War on the part of Spain, and the British-Boer War in South Africa). (3) Motives of humanity mixed with considerations of political and commercial interest (examples: the Spanish-American War on the part of the United States, and the Russo-Turkish War of 1877 on the part of Russia). (4) The desire for the realization of a

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between the real or fundamental causes of the struggle and the overt acts or events leading up to that great conflict. He justly remarks that we should look for real causes in the "motives which suggested such action and the policy which dictated it." The latter are apt to be mere irritants or pretexts. We should perhaps distinguish between: (*a*) the real or fundamental causes of a war; (*b*) its immediate causes; (*c*) the occasion or pretext.

[5] From an article by the writer, in the N. Y. *Independent* for November 4, 1899 (Vol. 57: 1036). *Cf. The Reader*, Vol. X, No. 4 (Sept., 1907).

The "Causes of War" is, properly speaking, not a topic with which International Law is concerned. But, owing to its great interest and importance, it has been deemed advisable to include some discussion of it in this text.

On the *Causes of War*, see especially: * Amos, *Remedies for War*, 57–130; Anitchkow, *War and Labor* (1900), Pt. II; Blutarsch, *Die Ursache der Völkerkriege*, etc., (1905); D'Eichthal, *Guerre et paix int.* (1909); Faguet, *Le pacifisme* (1908); Kamarowski, in 20 *R. D. I.* (1888), 132 ff.; * Lagorgette, *Le rôle de la guerre* (1906); Latourneau, *La guerre dans les diverses races humaines* (1895); Laveleye, *Des causes actuelles de la guerre en Europe et de l'arbitrage* (1873); Peyronnard, *Des causes de la guerre* (1901); Richet, *Le passé de la guerre et l'avenir de la paix* (1907); Saliéres, *La guerre, ses causes et ses resultats.*

more perfect nationality (examples: the Franco-German War of 1870 and the Prusso-Austrian War in 1866 for the unification of Germany, and the French-Italian War of 1859 against Austria for the union of Italy). (5) Wars of conquest or aggression (examples: most of the wars of the Revolutionary and Napoleonic period between 1792 and 1815 on the part of France, and the war of the United States against Mexico in 1846). (6) The suppression of revolutionary and democratic movements (examples: the invasion of Spain by France in 1823, and the suppression of the Hungarian revolt by Russia and Austria in 1849). (7) Wars of self-preservation (examples: the British-Boer War of 1900 on the part of the Boers, and the Russo-Japanese War on the part of Japan)."[6] (8) Wars for political independence (examples: our Revolutionary War and the Hungarian revolt of 1848).

332. **The So-called Justice or Injustice of War.** — Earlier publicists usually devoted considerable space to the discussion of the conditions under which wars may be considered just or unjust. "The justice of war in general or of a certain war in particular, are questions of the gravest importance and of the

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[6] From an article by the writer, in *The Reader* for Sept., 1907 (Vol. X, 340–341).

"It may be noted that several prolific causes of war have almost ceased to operate in modern times. Religious wars have almost disappeared from the pages of European history, and for nearly a century there have been no wars in Europe for the sake of dynastic interests or to maintain the Balance of Power. For the latter there has been substituted a system of alliances and the Concert of Europe — a development which has given to international relations a much firmer basis.

"On the other hand, we have several new causes of war or sources of international friction which can scarcely be said to have operated on a large scale before the nineteenth century. The remarkable development of the twin ideas of democracy and nationality have brought into existence new and mighty forces which may ultimately insure peace, but which nevertheless increase the possibility of armed conflicts between modern nations.

"Commerce, like democracy, is Janus-like, facing both ways. Although it is believed that in the main modern industrial conditions make for peace, many so-called political wars have really been commercial wars in disguise, and the present struggle for economic supremacy has given rise to a new doctrine of commercial imperialism which is a serious menace to the peace of the world." *The Reader*, cited above, 341–432.

It may be added that "if religious and dynastic wars are a thing of the past, recent contact between Orientals and Occidentals seems to indicate that there is a serious danger of a recrudescence of racial antipathies which, if they continue to grow, may furnish us with a new *casus belli* to which it will be extremely difficult to apply the principle of arbitration." See article in *Independent*, *op. cit.*

most vital interest, but they belong to the domain of International Ethics or Morality rather than to that of International Law."[7]

333. **Classification of Wars.** — Wars have been variously classified as public or private, international or civil, perfect or imperfect, principal and auxiliary, general or limited, just or unjust, offensive and defensive, wars of conquest, of intervention, etc., etc. The only distinctions which appear to have any value from a legal standpoint are those between (*a*) war in a material and legal sense,[8] and (*b*) between war on land and maritime warfare.

334. **The Purpose of War.** — A war has usually both a military and a political purpose. The military purpose is to overpower the enemy, *i.e.* to force his submission with the least possible sacrifice of life and property on both sides. The political purpose is to obtain that result for which the war was undertaken. This political purpose may change during the course of hostilities.

335. **The Area or Region of War.** — The area or region of war is "that part of the surface of the earth in which the belligerents can prepare and execute hostilities against each other."[9]

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[7] Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 67.

On *Causes of War*, with reference to their justice or injustice, see: Bluntschli, Arts. 515–521; Bonfils, Nos. 1002–1005; * 4 Calvo, §§ 1884–1896; Despagnet, Nos. 509–511; 3 Fiore, Nos. 1269 ff.; * Grotius, lib. I, c. 2 and lib. II, cc. 1, 22–26; * 1 Halleck, ch. 15; Heffter, § 113; 1 Klüber, §§ 41, 237; Lueder, in 4 Holtzendorff, 221–228; 2 G. F. de Martens, §§ 265–266; 2 Oppenheim, § 63; * 2 Piédelièvre, Nos. 798–803; 3 Phillimore, §§ 33–48; * 6 P.-Fodéré, Nos. 2663–2670; 2 Rivier, 202–205; Taylor, § 452; * Vattel, liv. III, §§ 24–50, 183–187.

The prevailing tendency among the best publicists is to justify war solely on the grounds of defense or necessity. It is the opinion of the writer that there are only two kinds of war which may be justified: (1) wars for the sake of defense or self-preservation; (2) struggles for liberty or freedom from oppression.

[8] For this distinction, see Chief Justice Fuller in the case of *The "Three Friends"* (1896), 166 U. S. 1, and Scott, 748, 578; and Wilson, § 96 (see the authorities cited on p. 243 n.). See also Wilson, Art. on "War," in 40 *Cyc. of Law and Procedure* (1912).

On the effects of a recognition of insurgency, or war in a material sense, see *supra*, §§ 113–114.

Some of the Continental publicists maintain that a civil war has no international character. This view is incorrect. The same rules apply to a civil as to any other war. On the conditions essential for the recognition of belligerency, see *supra*, §§ 115–116.

[9] 2 Oppenheim, § 70. Oppenheim adds: The "region of war ought to be distinguished from the theater of war," *i.e.* the area or theater of actual hostilities.

In general, this embraces all land and water outside of neutral jurisdiction,[10] including the open sea and the corresponding aërial space. The possible war area of a belligerent State includes its colonies, protectorates, and regions or districts under disguised forms of occupation or cession.[11] But it does not ordinarily include neutralized States or those portions of a State's territory, rivers, straits, canals, etc., which may have been neutralized.[12]

336. **The Fundamental Principles of Warfare.** — There are several fundamental or underlying principles which may be said to govern modern warfare in a general way:

(1) The principle of military necessity, but the kind and degree of force to be applied must be limited to the specific military end in view, and no more violence may be used at a given time than is necessary under the circumstances.[13]

(2) The principle of humanity, viz. that certain practices, such as the use of poison and submarine mines, are either wholly prohibited or limited because repugnant to the modern sense of humanity, honor, or fair play.

(3) War is a relation between States, or between a State and the subjects of the enemy State in so far as the latter are identified with the State for military purposes, — not a relation between individuals.[14]

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[10] It may include neutral territory in exceptional instances where the neutral State or territory is the main object of contention, as in the case of Korea and Manchuria during the Russo-Japanese War.

[11] See *supra*, §§ 105–106, 178, 185.

[12] See *supra*, §§ 109, 196 (note on p. 202), 201 (note on p. 211).

[13] As, for example, in case of bombardment and devastation, *infra*, 399–400 n., 402–403.

The principle of military necessity is thus modified by considerations of enlightened self-interest as well as of humanity. It must not be confounded with the false doctrine of military necessity (*Kriegsraison*) maintained by some German authorities. See Westlake's criticism of the views of Lueder, in *Chapters*, 238 ff. and 2 *Int. Law*, 115–117. Military necessity does not justify a violation of the rules of civilized warfare.

For more recent criticisms and expressions of the German view, see Carpentier, *Les lois de la guerre continental*, *passim*; *Kriegsgebrauch im Landkriege* (1902); Mérignhac, in 14 *R. D. I. G.* (1907), 197–239.

[14] I have adopted the compromise views of Westlake (see *Chapters*, 258–264, or 2 *Int. Law*, 32–38) on this much controverted subject. The controversy goes back to Portalis, who (in 1801) adopted Rousseau's doctrine that war is not a relation between individuals, but between States — a doctrine usually denied by Continental and supported by Anglo-American publicists.

337. **Reprisals in War.** — The main sanction for the observance of the rules of warfare on the part of belligerents is ordinarily furnished by public opinion, but reprisals may be said to provide a sort of special sanction in serious or extreme cases of their persistent violation.[15] Reprisals [16] in war consist in acts of retaliation, such as the seizure of persons or property of the enemy by way of indemnity or to prevent repetition of the offense in case of violations of the rules of warfare by the opposing belligerent.

It is generally admitted: (1) That reprisals or retaliatory acts of warfare should never be resorted to out of mere revenge, but only as a means of protective retribution. (2) They should only be admitted in grave cases of imperative necessity, and after careful inquiry into the nature of the alleged violations of the rules of warfare. (3) Their nature or scope should not exceed the measure of such violations. (4) They may only be resorted to with the authorization of the commander-in-chief. (5) They must be consistent with the laws of humanity and morality. (6) Redress for the wrong complained of, or punishment of the real offenders, must be otherwise unattainable.[17]

On these *Fundamental Principles of Modern Warfare*, see: Boidin, *Les lois de la guerre*, ch. 2; Bonfils, Nos. 1000–1009; Bordwell, ch. I; Creasy, 364 ff.; "Declaration of St. Petersburg of 1868" (preamble to), in Higgins, 5; Despagnet, No. 513; * Hall, Pt. I, ch. 3; Heffter, § 119; * Holland, *War on Land*, Nos. 1–3; Grotius, lib. III, cap. 7; Lawrence (3d ed.), § 225; *Ibid.* (4th ed.), § 205; * Lueder, in 4 Holtzendorff, 253–257, 371 ff.; Maine, 131 ff., especially 145; 2 Oppenheim, §§ 57, 67, 69; 2 Piédelièvre, Nos. 792, 829, 868–870; * 2 Rivier, 238 ff.; Taylor, § 451; Vattel, liv. III, §§ 136–138, 226; * 2 Westlake, 32–38, 52–59, 115–117; *Ibid.*, *Chapters*, 236–267; Wheaton, 342–343, 347.

[15] This applies more particularly to the rules of land warfare. The law of maritime capture is largely administered by prize courts.

See Art. 3 of the Fourth Hague Convention (4 H. C., 3) for special rules providing for compensation and responsibility in case of violation of the "Hague Regulations respecting War on Land." *Cf. infra*, § 400,

[16] Reprisals in time of war must be carefully distinguished from reprisals as a means of self-help in time of peace. See *supra*, § 322.

[17] Arts. 27–28 of the *American Instructions;* the *Oxford Code* (1880) of the Institute of Int. Law, Arts. 85–86 (see *Tableau*, 189–190, or 5 *Annuaire*, 174); and the Russian proposals at the Brussels Conference of 1874 (see 2 Oppenheim, § 250, or 2 Westlake, p. 112).

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CHAPTER XXIV

DECLARATION OF WAR AND ITS EFFECTS

338. **War an Abnormal Relation between States.** — "War is an abnormal relation between States, and produces abnormal conditions affecting the activities and interests of individuals as well. Consequently, its outbreak brings into existence a new set of rules affecting individuals and governments, which largely supplant or supplement those rights and obligations already existing in times of peace. In view of this fact, it is extremely important to fix upon a definite date for the beginning of these new and abnormal relations between belligerents on the one hand and the two or more belligerents on the other."[1]

339. **Is a Declaration of War Necessary?** — The question whether a formal notice of intention or declaration of war is necessary has been a subject of much controversy. The older as well as the more recent authorities have apparently been nearly equally divided on this subject.[2] And international practice has varied greatly, though in modern times declara-

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[1] Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 62.

[2] Anglo-American publicists have generally insisted that a declaration of war is not necessary. They have maintained that the date of the first actual outbreak of hostilities furnishes a better criterion for the commencement of a war than the date of the formal declaration. Their view is perhaps best expressed by Hall (6th ed., 370):

"An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality, unless an enemy must be given time and opportunity to put himself in a state of defense, and it is needless to say that no one asserts such quixotism to be obligatory."

On the other hand, the majority of Continental publicists have insisted upon the utility or necessity of declaration, though they appear to be almost equally divided on this point. For more or less extensive citations of the authorities, see: 4 Calvo, § 1906; Hall (6th ed.), 372–375, and note on pp. 375–376; Mérignhac, *La guerre sur terre*, 29–31 n.; 6 P.-Fodéré, No. 2673; and Rey, in 14 *R. I. P. D.* (1907), 306–307 n.

tion prior to hostilities has been, comparatively speaking, somewhat exceptional.[3]

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[3] Declarations were customary in Antiquity and the Middle Ages. The Romans were particularly strict in their observance of certain formalities connected with the declaration of war. See *supra*, § 37.

Declarations prior to hostilities were no longer considered necessary during the seventeenth century. In his investigations on this subject, General Maurice of the British army (see his *Hostilities without Declaration*, 1883, and an article published in the *Nineteenth Century* for April, 1904) found less than ten cases out of 118 examined of declarations prior to hostilities between 1700 and 1872. For a list of wars begun without formal declaration, see 2 *A. J.* (1908), 57–62.

But it should be noted that there has been a tendency in recent times to revert to the older practice of beginning war with a declaration, *e.g.* in the cases of the Franco-German War of 1870 and the Russo-Turkish War of 1877. The Chino-Japanese War of 1894–1895 began, however, with the capture of the Chinese transport *Koshung* by a Japanese cruiser; and, in the case of the Spanish-American War, the United States formally declared war on April 25, 1898, after the capture of several Spanish vessels and the blockade of Cuban ports on April 22. The existence of hostilities or actual outbreak of the war was dated back to April 21 by the Declaration itself. But it should be noted that these were preceded by an ultimatum or conditional declaration. See Benton, *The Int. Law and Diplomacy of the Spanish-American War* (1908), 99, 109 ff.

Considerable controversy was aroused by the Russian charges of treachery against the Japanese because of the latter's attack on the Russian fleets at Chemulpo and at Port Arthur on Feb. 8, 1904, two days prior to Japan's declaration of war against Russia on Feb. 10.

Authorities are in substantial agreement in rendering a verdict of acquittal in favor of Japan as far as these charges are concerned. The attack on the Russian fleet could not have been in the nature of a surprise, as Japan had severed diplomatic relations on Feb. 6 and informed the Russian Government that "the Imperial Government of Japan reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests."

It appears, however, that Japan actually began hostilities with the capture of the *Ekaterinoslav*, on the morning of Feb. 6, at least fourteen hours (allowing for the difference in time between Tokio and St. Petersburg) before the delivery of the Japanese note at the Russian capital, breaking off diplomatic relations. It seems that the decisive factor which determined the action of the Japanese was the appearance of the Russian fleet off the Shantung promontory between Port Arthur and the Japanese coast on Feb. 4. Under these circumstances, the Japanese Government may have been justified in ordering out its fleet even before the severance of diplomatic relations had been fully accomplished.

The following appears to have been the order of these occurrences:

February 4, 1904 — Russian fleet seen off the Shantung promontory.

February 5 at 2 P.M. — Dispatch of note from Tokio to St. Petersburg, breaking off diplomatic relations and orders to Vice-Admiral Togo to go in search of the Russian fleet soon afterwards.

February 6 at 7 A.M. — Sailing of Japanese fleet from Sasebo.

February 6 at 9 A.M. — Capture of the *Ekaterinoslav*.

February 6 at 2 P.M. — Severance of diplomatic relations at Tokio.

340. **A Sudden or Treacherous Attack Illegal.** — However, the authorities are generally agreed that nations are bound to refrain from sudden or treacherous attacks upon one another without negotiation or warning. "The use of a declaration does not exclude surprise, but it at least provides that notice shall be served an infinitesimal space of time before a blow is struck. . . . The truth is that no forms give security against disloyal conduct, and that when no disloyalty occurs, States always sufficiently well know when they stand on the brink of war."[4]

War is usually preceded by a long period of negotiations which may result in an ultimatum or a conditional declaration of war. With modern facilities for telegraphic and telephonic communication, a complete surprise would be well-nigh impossible.[5]

341. **The Rules of the Second Hague Conference.** — The controversy on the necessity or desirability of a declaration of war prior to hostilities has probably been at least partly set at rest by the Convention relative to the Commencement of Hostilities, signed by nearly all the States[6] represented at the Second Hague Peace Conference.

This Convention declares: "The Contracting Powers recognize that hostilities between them are not (*ne doivent pas*) to commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war (Art. 1)."

February 6 at 4 P.M. — Severance of diplomatic relations at St. Petersburg.
February 8, at noon — Japanese attack on Russian vessels at Chemulpo, Korea.
February 8, at midnight — Japanese attack on Russian fleet at Port Arthur.
February 10 — Declaration of War.

On this controversy, see: Ariga, *La guerre russo-japonaise*, ch. 1; Bordwell, ch. 14; Ehrens and F. de Martens, in 11 *R. D. I. P.* (1904), 133 ff.; Hershey, ch. 1; *Ibid.*, in 2 *A. J.* (1908), 944–945; Lawrence, *War and Neutrality*, ch. 2; *Ibid.*, *Principles* (4th ed.), § 140; Nagaoka, in 36 *R. D. I.* (1904), 461 ff.; Rey, in 14 *R. D. I. P.* (1907), 302 ff.; Smith and Sibley, ch. 3; and Takahashi, ch. I.

[4] Hall (6th ed.), 378.

[5] The surprise of a nation must not be confounded with that of an army or fleet. Thus Ariga (p. 26) admits that the Russian fleet at Port Arthur was surprised, not so Russia.

[6] The sole exceptions are China and Nicaragua. Nicaragua has since adhered. Nearly half of them had ratified in July, 1911.

"The state of war should be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be made by telegraph. Nevertheless, neutral Powers cannot plead the absence of notification if it be clearly established that they were in fact aware of the state of war (Art. 2)." [7]

The Hague Conference of 1907 has thus created an obligation not to commence hostilities without a previous conditional or formal declaration of war, as also to notify neutrals without delay; but there are some points not covered by these rules.

342. **War may Exist without Declaration.** — A declaration is, of course, unnecessary in the case of civil or purely defensive wars, and there can be no doubt that, in the future as in the past, war may exist without a declaration; and that in the absence of such a declaration of intention, the legal effects of the war date from the commencement of hostilities if these are an expression of hostile intent.[8] The failure to make a declaration would, however, constitute a breach of International Law.

The immediate effects of the outbreak of war may be thus summarized:

343. **The Effects of the Outbreak of War on (I) Diplomatic Relations.** — Diplomatic intercourse ceases upon the outbreak of

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[7] 3 H. C. (1907), Arts. 1 and 2. It should be noted that Art. 2 merely renders an existing custom obligatory.

"Article 1 of the present Convention shall take effect in case of war between two or more of the Contracting Powers. Article 2 is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention." Art. 3.

This Convention was based upon the rules adopted by the Institute of Int. Law in 1906. See 21 *Annuaire*, 292.

An amendment providing that hostilities should not commence until twenty-four hours after the delivery of the declaration or ultimatum had elapsed was proposed by Holland and supported by Russia; but it was rejected by a vote of 10 to 13, with five abstentions.

On these *Hague Rules*, see 1 *Actes et doc. de la deux. confér.*, 131; Bordwell, 198–200; Boiden, 116-121; * Higgins, 198–205; Bustamante y Sirven, ch. 8; * Holland, *War on Land*, §§ 16–17; Lawrence, *Principles* (4th ed.), § 140, pp. 348 ff.; Lémonon, 395–506; * 1 Scott, 516–522; Stowell, in 2 *A. J.* (1908), 50 ff.; 2 Westlake, 257.

[8] So far as the writer is aware, judges of prize courts (at least in the United States and England), who have been called upon to pass upon the validity of captures, made prior to a declaration, are unanimously of the opinion that war exists without a declaration. For cases, see Scott, 471–480.

war, and this usually occurs prior to the opening of hostilities through the recall or dismissal of public ministers or ambassadors[9] representing the belligerent governments. The exequaturs of the consuls of the enemy State are also usually withdrawn.

344. **Effect of War on (II) Treaties.** — It was formerly held that all treaties between the belligerents, excepting those concluded with a view to hostile relations, were annulled by the outbreak of war.[10] This doctrine has been abandoned by the great majority of publicists, but authorities are by no means agreed on the question whether the abrogation of treaties as a consequence of war is the rule or the exception. Nor does a study of international practice afford a certain solution of the problem.

There is, however, a certain agreement between international practice and the bulk of the authorities on the following points:

(*a*) Transitory or dispositive treaties,[11] or agreements which set up a permanent state of things, such as treaties of cession, boundary, independence, neutrality, and the like, are unaffected by war.[12]

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[9] It is customary for each belligerent to ask the minister or consul of a friendly State to take charge of the archives, etc., and look after the interests of its nationals during the war. Thus the interests of Great Britain in South Africa during the Boer War were intrusted to the American consulate at Pretoria, as the interests of the United States had been intrusted to the British legation at Madrid during the Spanish-American War.

The mere recall or dismissal of public ministers merely indicates very strained relations, and should not in itself be regarded as equivalent to a declaration of war.

[10] This absurd doctrine is held by a few leading authorities, *e.g.* 1 Kent, *Com.*, 177; 3 Phillimore, § 530; and 1 Twiss, § 252. But a reading of subsequent sections will show that Phillimore does not hold the doctrine in as absolute a form as he has been represented.

[11] *Cf. supra*, §§ 129–130, and p. 312 n.

[12] "Where treaties contemplate a permanent arrangement of territorial or other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. . . .

"We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace." Judge (*b*) Law-making treaties or conventions to which third Powers are parties, as, for example, the Hague Conventions, the International Postal Union, etc., remain in force. Such treaties, may, however, be suspended during a war, owing to the difficulty or impossibility of execution.

(*c*) Conventions entered into with a view to hostilities or which are applicable to a state of war are to be put into operation.

(*d*) Purely political conventions, such as treaties of alliance and agreements, the interpretation of which has given rise to the war, are abrogated.

(*e*) There is a difference of opinion respecting treaties of commerce, navigation, etc., but the better view would seem to be that their execution is merely suspended during the war. This is certainly the case with treaties of extradition, copyright, etc., dealing with matters having no connection with the war or its purpose. All such conventions may, of course, be treated as annulled, suspended, or as continuing in force at will of the belligerents, who usually define their status in the treaty of peace.

The general rule or principle governing this subject would seem to be that only such agreements as are incompatible with the ends of warfare are necessarily annulled or suspended, as the case may be; but that the belligerents may and should clearly indicate their position, more particularly in respect to commercial treaties and the like, in the treaty of peace.[13]

Washington, in *Society for Propagation of the Gospel* v. *New Haven* (1823), 8 Wheaton, 464, 494, and Scott, 4128. *Cf. Sutton* v. *Sutton* (1830), 1 R. and M. 427, a British case.

[13] International practice has varied greatly in this respect, but there is still a disposition to assume that treaties of commerce are annulled. A number of recent treaties of peace (*e.g.* those of Frankfort in 1871 between France and Germany and of Portsmouth in 1905 between Japan and Russia) place the commercial relations of the former belligerents upon the footing of the most-favored-nation clause, pending the negotiation of new conventions.

During the negotiations of the Treaty of Paris (1898) between Spain and the United States, the "American Commissioners proposed an article by which all the treaties in existence between the two countries at the outbreak of the war were enumerated and declared to continue in force." But the Spanish Commissioners insisted that the war had "terminated all agreements, compacts and conventions between the two countries" in accordance with the Spanish decree of April 23, 1898. Art. 29 of the Treaty of Friendship and General Relations between the United States and Spain (1902), provides that "all treaties, agreements, conventions, and contracts between the United States and Spain prior to the Treaty of

345. **Effects on (III) Subjects of Enemy State Found in Belligerent Territory at Outbreak of Hostilities.** — A continuous practice of over a century and a half has established the customary rule that nationals of the enemy State found in belligerent territory at the outbreak of war are permitted to remain during good behavior, unless their expulsion is required by military considerations.[14] Permission to remain carries with it, of course, the right to protection of life and property and obligations of temporary allegiance. If ordered to leave, alien enemies should be given a reasonable time for the withdrawal or disposal of their property. Nor may they any longer be forcibly detained or held as prisoners.[15]

Paris shall be expressly abrogated and annulled, with the exception of the Treaty signed the 17th of February, 1834 . . . for the settlement of claims . . . which is continued in force by the present Convention." 5 Moore, pp. 376–377. *Cf.* Benton, 118 ff.

On the *Effect of War on Treaties*, see especially a recent monograph by Jacomet, *La guerre et les traités* (1910). For a "Table showing the Effect of War on Treaties," see Lawrence (4th ed.), § 146. A *Project* on this subject was presented to the Institute of Int. Law in 1911. See 24 *Annuaire*, 220 ff.

[14] The only instances of expulsion during recent wars with which we are familiar have been that of the Germans from Paris in 1870 — a precautionary measure which has been much criticised; the expulsion of various categories of British subjects during the Boer War; and the forcible ejectment and cruel treatment of Japanese refugees in Manchuria and Siberia by the Russians during the Russo-Japanese War. In its Imperial Order of Feb. 28, 1904, the Russian Government had authorized Japanese subjects to "continue, under the protection of Russian law, to reside, and to follow peaceful callings in the Russian Empire except in territories forming part of the Imperial Lieutenancy in the Far East." In its "Instructions" of Feb. 10, 1905, the Japanese Government made no exceptions whatever, though it was made clear that such permission to continue residence in Japan should be considered as an act of grace and conditional upon good behavior. See Ariga, § 15; Hershey, 269, 282–283, 297–299; Lawrence, *War and Neutrality*, etc.; Takahashi, ch. 2.

[15] The last instance of forcible detention occurred in 1803, when Napoleon I ordered the arrest of all Englishmen residing in France between eighteen and sixty years of age as an unjustifiable reprisal for the British capture of French vessels without a prior declaration of war. Many of them were not freed before 1814.

Enemy merchants were generally given at least forty days for withdrawal and disposal of their goods, even in the Middle Ages.

The question has been raised whether, in view of the generality of the obligation of military service on the Continent of Europe it would be permissible to detain alien enemies who might otherwise join the opposing belligerent army. It would be difficult to justify an obligation to permit the departure of such persons, though it appears to be tolerated on grounds of policy. See, *e.g.*, Bonfils (Fauchille), No. 1053; and Hall (Atlay's 6th ed.), 386–387.

346. **Property Rights of Such Persons.** — The practice of confiscation of the property of the subjects of the enemy State found under belligerent jurisdiction at the outbreak of war is now obsolete. "Neither the principal nor the interest of a State debt can be confiscated or sequestered because the individuals to whom it is due are enemy subjects."[16] Private debts, *i.e.* debts due from private individuals to subjects of the enemy State are no longer held to be confiscable, even from a purely legal standpoint, though the payment of such debts may be suspended during the war.[17] The wars of the French Revolution furnish us with the last important examples of the confiscation of the private property of enemy subjects found in belligerent territory upon the outbreak of hostilities.[18]

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[16] 2 Westlake, 38. There has been no attempt of this sort involving "the honor of the prince" since 1752, when Frederick the Great withheld payment to British subjects of the interest on the "Silesian Loan," by way of reprisal for the British capture of Prussian vessels under rules of maritime warfare which he held to be illegal.

On the *Silesian Loan Controversy*, see 1 Cobbett, *Cases*, 334–335; 2 Martens, *Causes celêbrès*, 1–88; Snow, *Cases*, 243–246; and Wheaton, *History*, 206–217.

[17] The right to confiscate private enemy property was upheld by the older authorities. It was still admitted by the Supreme Court of the United States in *Brown* v. *U. S.* (8 Cranch, 110; and Scott, 486) as late as 1814 that private debts due the enemy, as also other private enemy property found in belligerent territory at the commencement of hostilities, may be confiscated according to the strict law of war; but that, under the Constitution of the United States, it might only be done by Congressional authority. But it is not likely that *Brown* v. *U. S.* would be followed to-day in the United States. The decisions even of a Chief Justice Marshall should not be deemed immortal.

In 1817 Lord Ellenborough held a Danish ordinance, confiscating private debts due British creditors from Danish debtors by way of reprisal, to be invalid and contrary to the Law of Nations, and refused to recognize the payment of such a debt to the Danish Government as an extinction of the obligation. *Wolff* v. *Oxholm*, K. B., 6 M. and S. 92; and Scott, 497.

This decision has been much criticised, but "our own conclusion is that the time is fully ripe when a British Court should not lag behind the position taken by Governments, but should boldly follow Lord Ellenborough." 2 Westlake, 44.

[18] *E.g.*, in 1793 upon the outbreak of war between France and European States. Art. 19 of the Treaty of Paris (1814) stipulated for restitution of all private property thus confiscated by France.

"Since the end of the Napoleonic Wars, the only instance of confiscation which has occurred was supplied by the American Civil War, in which the Congress of the Confederate States, by an Act passed in August, 1861, enacted that 'property of whatever nature, except public stocks and securities, held by an alien enemy since the 21st May, 1861, shall be sequestered and appropriated.'" Hall (6th ed.), 434.

"On the other hand, this rule does not prevent a belligerent from suspending the payment of enemy debts till after the war for the purpose of prohibiting the increase

347. **Effects on (IV) Enemy Merchantmen found in a Belligerent Port at the Outbreak of Hostilities.** — It is no longer customary to embargo, sequester, capture, or confiscate such vessels. "The uninterrupted practice of belligerent Powers since the outbreak of the Crimean War has been to allow enemy vessels *in their ports at the outbreak of hostilities*, to depart on their return voyage. The same privilege has been accorded enemy merchant vessels which sailed before the outbreak of hostilities, to enter and depart from a belligerent port without molestation on the homeward voyage." [19]

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of enemy resources; from seizing public enemy property on his territory, such as funds, ammunition, provisions, and other valuables; and from preventing the withdrawal of private enemy property which may be made use of by the enemy for military operations, such as arms and munitions. And it may be expected in the future that those enemy mail boats which were built from special designs for the purpose of quickly turning them into cruisers of the navy will be prevented from leaving the ports of a belligerent at the outbreak of war." 2 Oppenheim, § 102.

[19] Report of the American Delegation to the Hague Conference of 1907. See 2 Scott, 219.

At the beginning of the Crimean War, in 1854, six weeks were allowed by Russia, England, and France. Similar concessions were made by Prussia in 1866, France and Prussia in 1870, and by Russia and Turkey in 1870. According to President McKinley's Proclamation of April 26, 1898, Spanish merchant vessels in American ports were to be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports. They were not to be captured on their return voyage unless their cargoes included contraband of war, Spanish military officers, or any dispatches to or from the Spanish Government. It was further provided that "any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation." Such a vessel, it was declared, was not to be captured on her return voyage.

For the text of this proclamation, see *House Doc.* of 55th Congress, 3d session (Foreign Relations, Vol. 1898), 772. See the case of the *Buena Ventura* (175 U. S. 388), for the liberal interpretation of this proclamation by our Supreme Court, which held that the enemy's vessels were included within the intention of the President's proclamation, even though their departure from an American port had taken place before the war had begun. *Cf.* the cases of *The Panama* (175 U. S. 535, and Scott, 788) and *The Pedro* (175 U. S. 354). See also 7 Moore, *Digest*, § 1196; and Benton, 130 ff., 166 ff.

The Japanese Imperial Decree of Feb. 9, 1904, permitted Russian merchantmen, having no contraband on board, to load and discharge their cargoes and remain in Japanese ports until Feb. 16; and, according to the Czar's Order of Feb. 28, Japanese merchant vessels without contraband might remain in Russian ports for a maximum period of forty-eight hours after the publication of the "present declaration by the local authorities." See Hershey, 269, 281, 295–297; Lawrence, *War and Neutrality*, ch. 3; and Takahashi, Pt. I, ch 3.

348. **The Rules of the Hague Conference of 1907.** — The Hague Conference of 1907 must, therefore, be deemed to have taken several steps backward when it adopted the following Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities:

" When a merchant-ship belonging to one of the belligerent Powers is found, at the commencement of hostilities, in any enemy port, it is *desirable*[20] that it should be allowed to depart freely, either immediately or after a sufficient term of grace, and, after being furnished with a passport, to proceed straight to its port of destination or some other designated port.

" The same rule shall apply in the case of a ship which, having left its port of departure before the commencement of the war, has entered an enemy port in ignorance of hostilities (Art. 1)."

" A merchant-ship which, owing to circumstances of *force majeure*, may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which may not have been allowed to leave, can not be confiscated.

" The belligerent may only detain it under an obligation to restore it after the war without indemnity, or he may requisition it on payment of indemnity (Art. 2)."

" Enemy merchant-ships which left their last port of departure before the commencement of the war, and are encountered at sea while ignorant of the outbreak of hostilities, can not be confiscated. They are only liable to detention under an obligation to restore them after the war without indemnity, or to be requisitioned, or even restored, with indemnity and under the obligation of providing for the safety of the persons as well as the preservation of the papers on board.

" After having touched at a port of their own country at a neutral port, these ships are subject to the laws and customs of maritime warfare (Art. 3)."

" Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the war without indemnity, or to be requisitioned on payment of indemnity, either together with the ship or separately.

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[20] Russia proposed making the delay obligatory, but this was opposed by Great Britain, France, Japan, and the Argentine Republic. Consequently, the term *desirable* was adopted. This was a decided step backward. The Convention is also reactionary in several other respects, *e.g.* in the provisions making ignorance of the fact of hostilities a condition of immunity.

"The same rule applies in the case of cargo on board the vessels referred to in Article 3 (Art. 4)."

"The present Convention does not affect merchant-ships whose construction indicates that thay are intended to be converted into warships (Art. 5)."[21]

349. **Effects of War on (V) Non-intercourse between Belligerent Subjects.**—There are two contrasted views on this subject. The older authorities and the Anglo-American courts[22] have uniformly held that, unless specially licensed, trading or commercial intercourse between enemy subjects becomes *ipso facto* illegal upon the outbreak of war. This view is also shared by many modern authorities even on the Continent,[23] and has the support of considerable

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[21] 6 H. C. (1907), Arts. 1-5. "The provisions of the present Convention are only applicable between the Contracting Powers, and only if all the belligerents are parties to the Convention." Art. 6.

The Convention was signed by all the Powers with the exception of the United States, China, and Nicaragua. Germany and Russia made reservations with respect to Article 3. In July, 1911, it had been ratified by eighteen States. The United States' refusal to sign was based on the ground that the Convention is an unsatisfactory "compromise between those who believed in the existence of a right and those who refuse to recognize the legal validity of the custom which has grown up in recent years. The Convention cannot be called progressive, for it questions a custom which seems generally established, and its adoption would seem to sanction less liberal and enlightened practice." 2 Scott, *The Hague Peace Conferences*, 568.

On the *Sixth Hague Convention*, see: 3 *Actes et doc. de la deux. conférence*, 825-830, 852-853, 884-886; Bustamante y Sirven, ch. 9; Dupuis, *Le droit de le guerre maritime* (1911), Nos. 75-81; * Higgins, 295-307; Lémonon, 647-661; * 1 Scott, 556-568; 2 *Ibid.*, 219-221, 415-421; *Ibid.*, in 2 *A. J.* (1908), 259 ff.; 2 Westlake, 307.

[22] The leading British case is that of *The Hoop* (1799), 1 Rob. 196, and Scott, 521. In this case, one of particular hardship upon British merchants, Sir William Scott stated it as his opinion, based mainly on the authority of Bynkershoek, that "there exists such a general rule of maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted." He gives evidence to show that it was also the law of France, Spain, and Holland. *Cf. Potts* v. *Bell* (1900), Scott, 525.

The leading American case is that of *The Rapid* (1814), 8 Cranch, 156, and Scott, 557. The rule against trading was enforced against an American citizen who, after the outbreak of hostilities, had merely tried to bring home property which he had bought in England before the War of 1812 and deposited on a small British island "situated near the line between Nova Scotia and the United States." See, generally, the cases in Scott, 531-565.

[23] *E.g.* Bonfils (Fauchille), Nos. 1060-1065; Geffcken, note 5 to Heffter, § 123;

present-day international practice; but it is condemned or regarded as obsolete by an increasing number of authorities,[42]

Mérignhac, *La guerre sur la terre*, Nos. 32–33; and Pillet, *Les lois actuelles*, No. 40. This is also the view of 4 Calvo, §§ 1926 ff. and 1953 ff.; and most of the Anglo-American authorities, as, *e.g.*, Hall (6th ed.), 383–385; Lawrence (3d ed.), § 165; 3 Phillimore, § 69; Taylor, § 465; 2 Twiss, § 44 ff.; Wheaton, § 309 ff.; Woolsey, § 123.

[24] Among the authorities who regard the older view as obsolete, or who may at least be said to favor a more liberal and enlightened practice, are: Bluntschli, Art 674; Bordwell, *Law of War* (1908), 202–203, 208–211; Bentwich, *War and Private Property* (1907), ch. 5; Lawrence (4th ed.), § 143; Lueder, in 4 Holtzendorff, 358 ff.; Manche, *La déclaration de guerre* (1909), ch. 11; 3 F. de Martens, § 109, p. 202; Maurel, *De la déclaration de guerre* (1907), 339–343; Phillipson, *Effect of War on Contracts* (1909), 53 ff.; 2 Piédelièvre, Nos. 841–846; 6 P.-Fodéré, Nos. 2697–2699; 2 Rivier, 231–232; Ullmann (2nd ed.), § 173; and 2 Westlake, 44-51.

It is especially gratifying that the newer doctrine is gaining adherents in England and America. Bentwich (p. 50) observes: "A large part of the authority about trading with the enemy is really obsolete, but unfortunately, being embodied in case law, it has not been swept away." Lawrence (4th ed., § 143) has changed his former views on this subject. Westlake (II, 45) does not hesitate to call attention to the "conservative tendency of courts." And Bordwell (p. 203) says: "It is desirable that the view that war itself does not put an end to commercial intercourse, but that its illegality depends on its interdiction by the political authorities, should find even wider recognition than it has. . . . Where commerce is allowed, the rule that an alien enemy has no standing in court does not apply, and contracts can be made and enforced as in time of peace. Since the beginning of the Crimean War, a very large indulgence in commerce between belligerents has been allowed. Thus, in the Spanish-American War, neutral vessels, laden with American-owned cargoes other than contraband of war, cleared for Spanish ports." *Cf.* 7 Moore, *Digest*, § 1135, pp. 241–243. A tendency toward a more lenient practice was shown even by our Supreme Court in *Mathews* v. *McStea* (1875), 91 U. S. 7, and Scott, 508.

"By German law, a license to trade is presumed, and explicit notice is required to forbid specific kinds of commerce. But contraband trading is, of course, always prohibited, and the participation of a German citizen in the Morgan (English) war loan to France in 1870 was held illegal and invalid. In France and England the older principle prevails that all commerce is interdicted by the mere declaration of war, and that special licenses are required to permit any limitation of the rule." Bentwich, *op. cit.*, 51.

On *License to Trade*, see especially Bordwell, 210–211; Bonfils, No. 1062; *4 Calvo, §§ 1969 ff.; *Hall (6th ed.), 550–552; *2 Halleck, ch. 30; *Lawrence (3d ed.), §§ 165, 235; *Ibid.* (4th ed.), pp. 455–456, 560–562; 7 Moore, § 1141; 2 Oppenheim, § 217; Phillipson, *Effects of War on Contracts*, 65–66; 6 and 7 P.-Fodéré, Nos. 2700, 2938; *Scott, *Cases*, 526–534; *Taylor, § 512; *Wheaton, §§ 409–410, and Dana's note, No. 198; Woolsey, § 155.

This subject is one which is regulated by municipal law. Licenses are *general* when they permit a State's own subjects or all enemy or neutral subjects to trade in particular articles or at particular places; they are *special* when they permit particular individuals to carry on a trade in the manner described by the document itself. General licenses are granted only by the Government itself, special licenses may sometimes be granted by commanders in chief. Licenses were granted on a and international practice shows a growing tendency toward the adoption of the more liberal rule that such trading as is not incompatible with military aims is permissible, unless specially prohibited by either of the belligerent governments. The main obstacles to the growth of a more enlightened practice would seem to be the existence of a number of contrary precedents embalmed in case law and the hide-bound conservatism of Anglo-American courts, which manifests itself in this as in every other branch of jurisprudence. In view of the diversity of opinion and practice in this matter, it should be reasonably clear that there is no rule of International Law governing the subject, and that commercial intercourse between so-called enemy subjects is really regulated by municipal law.[25]

350. **Trading with the Enemy. Anglo-American Practice.** — Though there is no rule of International Law governing this subject, its importance demands a brief summary of Anglo-American practice. In general, the English and American courts hold that, with the exception of that class known as *commercia belli* (ransom bills,[26] bills of exchange drawn by prison-

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large scale by Napoleon I, but special licenses are now practically obsolete. This makes the jurisprudence bearing on the subject obsolete also. The most general rule is that they are strictly construed. Contracts under a license are valid.

[25] This is the opinion of Oppenheim (II, § 101.) He says Manning is the only British publicist who seems to agree with him. Bentwich (p. 47) and Phillipson (p. 48) appear to share this view, which obviously coincides with the facts of international practice, if not with the decisions and authorities.

[26] "Ransom is the repurchase by the original owner of the property acquired by the seizure of a prize. . . . When a vessel is released upon ransom the commander gives a ransom bill, by which he contracts for himself and the owner of the vessel and cargo that a stipulated sum shall be paid to the captor." Hall (6th ed.), 455.

The duplicate copy of the ransom bill serves as a safe-conduct for the captured vessel so long as it keeps within its prescribed course. The captor usually retains an officer of the prize as a hostage for the payment of the stipulated ransom. Ransom bills are construed strictly. The courts of most States (including probably the United States) allow the captor to sue directly on a ransom bill, but Great Britain holds so strictly to the rule that enemy subjects have no standing in her courts, that she has always refused to permit direct suit by the captor. "The difficulty was, however, surmounted by allowing the British hostage to bring an action in British courts for the recovery of his liberty, which could, of course, be obtained only by the payment of the promised sum." Lawrence (3d ed.), p. 338. Great Britain prohibited the taking or giving of ransom bills in 1782, though it was subsequently allowed in cases of necessity, and since 1864 may be permitted by an Order in Council. In 1870 France permitted ransom only in case of absolute necessity. Though apparently obsolete, the practice has never been prohibited by the United States.

ers of war and the like), all contracts concluded during war with enemy subjects are illegal and hence null and void. No action upon such contracts will be entertained, either during or after the war. But contracts made before the war are usually merely suspended as to their execution, and the enemy subject's right of suit revives at the close of the war.[27] Commercial partnerships are dissolved, as are in general all executed and executory contracts existing between enemy subjects which require further acting upon during hostilities, executory contracts which do not require to be further acted upon being merely suspended.[28]

On *Ransom Bills*, see * Atherley-Jones, *Commerce in War*, (1907), 585, 637–645; Bordwell, 227; Bonfils (Fauchille), No. 1414; De Boeck, Nos. 257–267; 4 Calvo, §§ 2422–2429; Dupuis, Nos. 269–277; * Hall (6th ed.), 455–456; 2 Halleck (Baker's 3d ed.), 329–333; * Lawrence (3d ed.), § 208; *Ibid.* (4th ed.), § 184; 7 Moore, *Digest*, § 1214; 2 Oppenheim, § 195; Perels, § 57, pp. 336–337; 3 Phillimore, §§ 109–110; Phillipson, 67–68; Pillet, No. 228; 8 P.-Fodéré, Nos. 3189–3190; * Scott, *Cases*, 566–584; 2 Twiss, §§ 180–181; * Westlake, 158–160; Wheaton, § 411 and Dana's note, No. 199; Woolsey, § 150.

[27] But these rules do not apply to aliens of belligerent nationality who are permitted to reside in the enemy country. "An alien enemy residing in this country may contract and sue like a citizen (2 Kent, *Com.*, 63). When the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment then to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor." Justice Gray, in *Kershaw* v. *Kelsey* (1868), 100 Mass., 561, and Scott, 537.

[28] Bentwich, *War and Private Property*, 48–49. Bentwich cites *Esposito* v. *Bowden* (24 L. J. Q. B. 210, and 4 E. & B. 763) — a case growing out of the Crimean War — as the leading case on this subject.

The leading case on the dissolution of commercial partnerships is *Griswold* v. *Waddington* (Court of Errors of N. Y., 1819), 16 Johnson's Reports, 438, and Scott, 504. The leading case on ordinary contracts is *Ex parte Boussmaker* (Chancery, 1806), 13 Vesey Jun. 17, and Scott, 494. In *Hoare* v. *Allen* (Sup. Ct. of Pa. 1789), 2 Dallas, 102, and Scott, 498, it was held that interest on a mortgage due a British subject residing in London in 1773 did not run during the Revolutionary War. But this decision is in conflict with *Ex parte Boussmaker.* In *Hanger* v. *Abbott* (1867), 6 Wallace, 532, and Scott, 500, our Supreme Court held that the Statute of Limitations did not run whilst the right of action is suspended by war.

In *N. Y. Life Ins. Co.* v. *Statham* (1876), 93 U. S. 24, and Scott, 512, our Supreme Court decided that non-payment of premiums, due to the outbreak of war, annuls a life insurance policy "in which time is material and of the essence of the contract"; but that the insured is "fairly entitled to have the equitable value of his policy," *i.e.* the amount of the premiums actually paid, minus the value of the insurance enjoyed.

In *Kershaw* v. *Kelsey* (1868), 100 Mass. 561, and Scott, 536, Justice Gray thus summarized the law governing intercourse between enemy subjects as judicially declared in Great Britian and the United States:

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Declaration of War and its Immediate Effects. — Anis, *Du droit de déclarer la guerre* (1909); Bellat, *La déclaration de guerre* (1909); Bluntschli, Arts. 521–556; * Bonfils (Fauchille), Nos. 1027–1065; Bordwell, Pt. II. ch. 1; Bruyas, *De la déclaration de guerre* (1899); Bry, Nos. 378–385; 4 Calvo, §§ 1899–2003; Despagnet, Nos. 517–523; Dupuis, in 13 *R. D. I. P.* (1906), 725 ff.; Féraud-Giraud, in 17 *R. D. I.* (1885), 19 ff.; Funck-Brentano et Sorel, *Précis*, liv. II, c. 2; Hall, Pt. III, ch. 1; 1 Halleck, ch. 17; Heffter (Geffcken), §§ 120–123; * Lawrence (3d ed.), 161, 165–168, 195–198; *Ibid.*, (4th ed.), §§ 140, 143–146, 171–174; Liszt (3d ed.), § 39; Longuet, *Le droit actuel de la guerre terrestre* (1901), §§ 1–15; Lueder, in 4 Holtzendorff, 332–362; Manche, *La déclaration de la guerre*, etc. (1909); 3 F. de Martens, §§ 108–109; Maurel, *De la déclaration de la guerre* (1907); * Maurice, *Hostilities without Declaration* (1883); *Ibid.*, in *Nineteenth Century*, April, 1904; * Mérignhac, *De la guerre sur terre* (1903), 29–65; 7 Moore, *Digest*, §§ 1106–1108; *Ibid.*, in 37 *R. D. I.* (1905), 517 ff.; 2 Oppenheim, §§ 93–102; Owen, *Declaration of War* (1889); 3 Phillimore, Pt. IX, chs. 5–8; * Pillet, *Les lois actuelles de la guerre* (1901), ch. 3; 2 Piédelièvre, Nos.

It "prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and this includes . . . any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or by orders for the delivery of either, between the two countries, directly or indirectly, or through intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission or by insurances upon trade or with the enemy. Beyond the principles of these cases the prohibition has not been carried by judicial decision. . . .

"At this age of the world," he continued, "when all the tendencies of the Law of Nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their Governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

Consequently, the Supreme Court of Massachusetts unanimously decided that the plaintiff, the owner of a sugar planation in Mississippi, might recover unpaid rent, etc., on land which he had leased to the defendant, a citizen of Massachusetts, during the Civil War. "It is perhaps not too much to say that this is the leading American case on this subject. It has been repeatedly cited and followed." Scott, 538 n.

The legal rights of debenture holders and shareholders in companies incorporated or trading in an enemy country do not appear to have been definitely defined, but there appears to be no sound reason for confiscating their property or holding their connection with the corporation dissolved on the analogy of commercial partnerships.

806–849; 6 P.-Fodéré, Nos. 2671–2720; * 2 Rivier, 220–237; St. Croix, *La déclaration de guerre*, etc. (1892); * Scott, *Cases*, 464–584; Snow, *Cases*, 250–314; Taylor, §§ 455–468; Ullmann (2nd ed.), §§ 171–173; Vattel, liv. III, §§ 51–65; Walker, *Manual*, §§ 37–50; * 2 Westlake 18–51; Wheaton, Pt. IV, ch. 1, and Dana's notes, Nos. 156–158; Wilson, chs. 10–11; Woolsey, §§ 120–124.

CHAPTER XXV

THE LAWS OF LAND WARFARE

351. **The Chief Means and Aims of Land Warfare.** — Land warfare has two main aims — the reduction or defeat of the enemy's armed land forces, and the temporary occupation and administration of the whole or a portion of the enemy's territory. The chief means by which it is sought to accomplish these ends are the application of armed force and the enforcement of military or martial law. The law of military occupation will be dealt with in the following chapter.

1. Lawful Belligerents

352. **Who are Lawful Belligerents?** — The Hague Regulations respecting the Law and Customs of War on Land lay down these definite rules relating to lawful belligerents:

"The laws, rights and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling the following conditions:

"(1) To be commanded by a person responsible for his subordinates;

"(2) To have a distinctive emblem fixed and recognizable at a distance.

"(3) To carry arms openly; and

"(4) To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army' (Art. 1)." [1]

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[1] H. R. (1899 and 1907), Art. 1. *Cf.* B. D. (Brussels Declaration of 1874), Art 9, of which H. R., 1 is almost an exact verbal reproduction. For the text of B. D.,

353. **Levies *en masse*.** — "The population of a territory which has not been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents *if they carry arms openly* and if they respect the laws and customs of war (Art. 2)." [2]

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see Higgins, *The Hague Peace Conferences*, 273 ff.; or Scott, *Texts of the Peace Conferences at the Hague*, 382 ff.

These conditions were not observed by the Prussians during the Franco-German War of 1870–1871. They required that "every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier by showing that he has been called out and borne in the lists of a military organized corps, by an order emanating from the legal authority and addressed to him personally" — an impossible requirement. They also required an emblem or distinctive mark, clearly distinguishable at rifle distance — an absurd condition in these days of long-distance firing. See especially: Bordwell, 90 ff.; Hall (6th ed), 510 ff.; Lawrence (4th ed.), § 219; * Spaight, *War Rights on Land*, 41–46; and 2 Westlake, 61.

It should be noted that H. R., 1 leaves several important questions, such as the use of guerilla troops and savages in land warfare, to be dealt with by "the principles of the Law of Nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." 4 H. C., Preamble. See Higgins, 211.

The Hague Regulations appear in the form of an annex to 4 H. C. (the Fourth Hague Convention of 1899 and 1907), by which the Contracting Parties agreed to issue to their armed land forces instructions which shall be in conformity with these Regulations. The provisions contained in them are declared to be "only binding between Contracting Powers, and only if all the belligerents are parties to the Convention: "*A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*" 4 H. C. (1907), Arts. 1–3.

Whether guerrilla, irregular, or detached bodies of men are entitled to the privileges of legitimate combatants, would seem to depend upon whether they fulfill the four conditions laid down in 1 H. R., 1. On *Guerrilla Warfare*, see especially the somewhat lengthy citation from Leiber's *Miscellaneous Writings* (II, 277 ff.), in 1 *A. J.* (1907), 15–18.

The use of so-called savage or semi-barbarous troops in modern warfare would appear to be subject to the same conditions. During the Russo-Japanese War, Admiral Alexieff issued an order offering special inducements to convicts from the island of Sakhalin to enlist in the Russian army. Though this cannot be regarded as a positive violation of the Law of Nations, "there is something peculiarly revolting to modern conceptions of humanity in the employment of criminals for purposes of warfare." Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, 309–311. *Cf.* Ariga, § 25.

[2] H. R., 2. The italicized phrase was added in 1907. *Cf.* B. D., Art. 10.

This article recognizes the legality of levies *en masse* provided they fulfill the two conditions laid down. It represents a compromise between the opposing view of the larger and smaller States both at Brussels and at The Hague. The delegates from the weaker Powers desired a general recognition of levies *en masse* in occupied

354. **Division into Combatants and Non-combatants.** — "The armed forces of the belligerents may consist of combatants and non-combatants. In case of capture by the enemy, both have a right to be treated as prisoners of war (Art. 3)."

2. PRISONERS OF WAR

355. **Treatment of Prisoners of War.** — "Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them.

"They must be humanely treated.

"All their personal belongings, except arms, horses, and military papers, remain their property (Art. 4)." [3]

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as well as in unoccupied territory, without reference to the requirements of Article 1. But those from the more powerful States, particularly the German delegation, urged that the conditions laid down in Article 1 be applied to such risings. It was finally agreed that levies *en masse* in occupied territory should be left to the customary Law of Nations. As the matter stands, the status of so-called "war rebels" is uncertain. See especially Bordwell, 232 ff.; and Hall (6th ed), 141–145.

"War rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, Government or not. . . ." 1 *A. I.* (Lieber's *Instructions* of 1864 for the Armies of the United States), Art. 85. For the text of these important "Instructions," see Scott, *Text*, etc., 350 ff.

This article is too harsh for present-day practice. Unauthorized individuals may be doubtless thus dealt with, and rigorous measures may be taken to prevent uprisings. But organized war insurgents on occupied territory are certainly entitled to treatment as lawful combatants if they fulfill the conditions laid down in H. R., 1.

[3] H. R., 4. *Cf.* B. D., 23. "Prisoners may of course be deprived for a time of the use of their property, for sufficient reasons; and it may be a question whether large sums of money found upon prisoners, or in their baggage, are in fact their private property." Holland, *The Laws of War on Land* (1908), No. 24. The *American Instructions* permitted the appropriation of *large* sums of money by the commander for the use of the army. *A. I.*, Art. 72. In the light of H. R., 4, even large sums (provided it be really private property) could only be sequestered.

Military writers have sometimes asserted that a commander may kill his prisoners under circumstances of extreme danger or necessity, and Napoleon's destruction of 4000 prisoners at Jaffa is cited as an example of such necessity. But even in this case humanity would have been the better policy, as the sequel showed. "The massacre inspired the garrison of Acre with such desperate courage that the French failed in all their assaults on the place, and were obliged to abandon their dream of eastern conquest and retreat across the desert to Egypt." Lawrence (3d ed.), § 187, p. 337. Under modern conditions of warfare, it is difficult to imagine a case where the destruction of prisoners would be necessary for the sake of self-preservation.

356. **Internment of Prisoners.** — "Prisoners of war may be interned in a town, fortress, camp, or any other locality, and are bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety, *and only while the circumstances which necessitate the measure continue to exist* (Art. 5)." [4]

357. **Their Labor and Maintenance.** — "The State may utilize the labor of prisoners of war, *other than officers*, according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the operations of the war.

"Prisoners may be authorized to work for the public service, for private persons, or on their own account.

"Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed for similar tasks; or, *if there are no such tariffs in force, at rates proportional to the work executed.*

"When the work is for other branches of the public service, or for private persons, the conditions shall be settled in agreement with the military authorities.

"The earnings of the prisoners shall go toward improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance (Art. 6)." [5]

"The Government into whose hands prisoners of war have fallen is bound to maintain them.

"Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them (Art. 7)." [6]

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[4] H. R., 5. *Cf.* B. D., 24. "The distinction here is between restriction to a specified locality and close confinement." Holland, No. 250.

[5] H. R., 6. *Cf.* B. D., 25–26. Art. 25 of the Brussels Declaration of 1874 provided that "prisoners of war may be employed on certain public works which have no immediate connection with the operations on the theater of war, provided," etc. But this provision was dropped at The Hague. This would seem to indicate that prisoners are not to be employed on fortifications even at a distance from military operations. This is the opinion of Westlake, II, 64. For the contrary view, see Bordwell, 240; and Holland, No. 26.

[6] H. R., 7. *Cf.* B. D., 27. "The second paragraph here must, of course, be read subject to military necessities." Holland, No. 27. Bordwell (p. 241) calls attention to the special importance of the principle of the duty of maintenance as applied to reconcentration camps.

358. **Their Punishment and Escape.** — "Prisoners of war shall be subject to the laws, regulations and orders in force in the army of the State into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

"Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

"Prisoners who, after having succeeded in escaping, are again taken prisoners, are not liable to any punishment for the previous flight (Art. 8)."[7]

"Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to prisoners of war of his class (Art. 9)."[8]

359. **Release on Parole.** — "Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personal honor, scrupulously to fulfill, both as regards their own Government and the Government by which they were made prisoners, the engagements they have contracted.

"In such cases, their own Government is bound not to require of nor accept from them any service incompatible with the parole given (Art. 10)."[9]

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[7] H. R., 8. *Cf.* B. D., 28. "H. R. 8 omits from B. D. 28 the express permission to use arms against a prisoner attempting to escape, after summoning him, but to fire on him would certainly be allowable. The disciplinary punishment mentioned is not understood to include death, but plots, rebellion, or riot would bring a prisoner under the former part of the article, and the penalty of death might be incurred in them." 2 Westlake, 64. *Cf.* Holland, No. 28; Bordwell, 241–242; Holls, 146–147; and Spaight, 286–290.

[8] H. R., 9. *Cf.* B. D., 29.

[9] H. R., 10. *Cf.* B. D., 31. The terms of the parole are a matter of contract between the parties. "The usual terms are that the prisoner, unless exchanged, will not serve during the existing war against the captor or his allies engaged in the same war; and this is understood to refer only to active service in the field, and not to debar the paroled prisoner from performing military or administrative duties of any kind at places not within the seat of actual hostilities." 2 Westlake, 65. *Cf.* *A. I.* (*American Instructions*), Art. 130, cited by Bordwell, 234.

It should be noted that a Government is only bound by the parole of its soldiers. If the law forbids it, there is certainly no obligation. If the law is silent and the Government disapprove, the paroled prisoner should be given an opportunity

"A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole (Art. 11)." [10]

360. **Breach of Parole.** — "Any prisoner of war who is liberated on parole and recaptured bearing arms against the Government to which he had pledged his honor, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and can be brought before the Courts (Art. 12)." [11]

361. **Army Followers.** — "Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands, and whom the latter thinks fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying (Art. 13)." [12]

362. **Bureau for Information Relative to Prisoners.** — "A Bureau for Information relative to prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, should the case happen, in the neutral countries

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to return to captivity. "In either case, however, the parole is personal and subjects the person who has broken it to punishment by the other side on recapture." Bordwell, cited above.

In the American and British armies it has been customary to allow paroles to be given only through a commissioned officer except in cases of extreme hardship. No such distinction seems to be made in France.

[10] H. R., 11. *Cf.* B. D., 32.

"No paroling on the battlefield, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners with a general declaration that they are paroled, is permitted or of any value." *A. I.*, Art. 128.

[11] *I.e.* the military courts. H. R., 12. *Cf.* B. D., 33. For many interesting details on the subject of parole, see Spaight, *War Rights on Land*, 290–300.

[12] H. R., 13. *Cf.* B. D., 34. As a rule such persons are not detained, but detention is often practiced for military reasons.

On the *Status and Treatment of War Correspondents*, see Hershey, *Russo-Japanese War*, 119–121 and notes for references and citations; Ariga, 35; and Takahashi, ch. 5. See also Benton (for Spanish-American War), 153 155; Bonfils (Fauchille), No. 1100; Despagnet, No. 537; Longuet, §§ 73–74; 1 Rey, 350 ff.; * Higgins, in 6 *Zeitschrift* (1912), 19–28; and * *Int. Law Situations* (1904).

High civil functionaries are also liable to capture and treatment as prisoners, whether they belong to the army or not. There appears to be a difference of opinion respecting persons temporarily employed, such as guides, teamsters, messengers, etc. Such temporary employees are usually considered liable to capture, but Pillet (p. 194) thinks it would be unjustifiable to hold them as prisoners.

in whose territory belligerents have been received. This Bureau, being charged with answering all inquiries about prisoners of war, is furnished by the various services concerned with all the information respecting internments and transfers, *releases on parole, exchanges, escapes,* admissions into hospital, deaths, as well as all other information necessary to enable it to make out *and keep up-to-date* an individual return for each prisoner of war. *The Bureau must state in this return the regimental number, surname and name, age, place of origin, rank, the corps, wounds, date and place of capture, of internment, the wounds and the death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of the peace.*

"It is also the duty of the Bureau of Information to gather and keep together all objects of personal use, valuables, letters, etc., found on the battlefield or left by prisoners who have been *released on parole, or exchanged, or who have escaped,* or died in hospitals or ambulances, and to forward them to those interested (Art. 14)." [13]

363. **Relief Societies for Prisoners.** — "Relief societies for prisoners of war, regularly constituted in accordance with the law of their country for the purpose of serving as intermediaries for charity, shall receive from the belligerents, for themselves and their duly accredited agents, every facility, within the bounds set by military necessities and administrative regulations, for the effective accomplishment of their humane task. Delegates of these Societies may be admitted to distribute relief at places of internment, as also at the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all regulations for order and police which the latter may prescribe (Art. 15)." [14]

364. **Freedom of Postage.** — "The Bureau of Information shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war or dispatched by them, shall be free of all postal rates,

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[13] H. R., 14. The italicized portions were added in 1907. *Cf.* G. C., 4, *infra,* § 369.

[14] * H. R., 15.

alike in the countries of origin and destination and in those they pass through.

"Gifts and relief in kind for prisoners of war shall be admitted free of all duties, as well as of payments for carriage by the Government railways (Art. 16)."[15]

365. **Payment of Officers taken Prisoners.** — "Officers taken prisoners shall receive *the same pay as officers of corresponding rank in the country where they are detained*, the amount to be repaid by their Government (Art. 17)."[16]

366. **Freedom of Religious Worship.** — "Prisoners of war shall enjoy every latitude for the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authority (Art. 18)."[17]

367. **Wills, Death Certificates, etc.** — "The wills of prisoners are received or drawn up on the same conditions as for soldiers of the national army.

"The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank (Art. 19)." [18]

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[15] *Ibid.*, 16. On this article, Holland (No. 36) makes the following comments: "To give full effect to this article, new postal conventions would be necessary, as also, probably, fresh legislation. Letters written to, or received for, prisoners are liable to such censorship as may be ordered. The provision in the second paragraph would apply only to articles for personal use."

The adoption of the plan of a Bureau of Information, etc., for prisoners of war appears to have been largely due to the untiring efforts of M. Romberg, head of the Brussels committee for the care of prisoners during the Franco-German War. It was rejected at the Brussels Conference of 1874, but accepted at the Hague in 1899 with comparatively little discussion. Bordwell, 245–460. See also Holls, 150.

The plan was first put to an actual trial during the Russo-Japanese War, though voluntary or unofficial Bureaus of Information for the sick and wounded had been established in some previous wars. It appears to have been operated very successfully, especially by the Japanese, who, however, made some complaint of delay and neglect on the part of the Russian Bureau. Hershey, *op. cit.*, 278 n., 284, 289–293, 319–323. *Cf.* Ariga, 97–100; 1 Rey, 427 ff.; and Takahashi, 114–123.

[16] *Ibid.*, 17. "Unless, of course, the liability is undertaken, in the Treaty of Peace, by the other belligerent." Holland, No. 37. According to H. R., 17 (1899), they were to receive "the full pay allowed them in this position by their country's regulations."

Art. XIII of the Treaty of Portsmouth contained the following provision: "Russia engages to repay to Japan . . . the difference between the actual amount so expended by Japan (for the care and maintenance of prisoners) and the actual amount similarly disbursed by Russia."

[17] *Ibid.*, 18. "This article cannot, of course, be fully put into execution unless a chaplain of the prisoner's own persuasion happens to be present." Holland, No. 38.

368. **Repatriation of Prisoners.** — "After the conclusion of peace, the repatriation of prisoners of war shall take place with the least possible delay (Art. 20)." [19]

3. The Sick and Wounded

369. **Treatment of the Sick and Wounded of the Enemy.** — "The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention (Art. 21)." [20]

"The soldiery and other persons officially attached to armies, who are sick and wounded, shall be respected and cared for by the belligerent in whose power they are, without distinction of nationality.

"Nevertheless, a belligerent who is compelled to abandon sick or wounded to the enemy shall, as far as military exigencies permit, leave with them a portion of his sanitary personnel and material to aid in caring for them (Art. 1)." [21]

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[18] H. R., 19. *Cf.* G. C., 4, *infra*, § 369, and H. R., 14, *supra*, § 362.

[19] H. R., 20. Holland (No. 40) justifies delay for the following reasons: (1) insufficiency of transport; (2) obvious risk; (3) punishment for offenses committed during imprisonment.

The first reason is unquestionably a good one; the second is vague and extremely doubtful; and the third requires some explanation.

Prisoners may undoubtedly be detained after the conclusion of peace to serve out a sentence or imprisonment imposed for common law crimes and until they have paid any debts incurred during captivity, but it is a moot point whether they may be detained as a punishment for mere disciplinary offenses. I agree with Westlake (II, 67) that this would be a violation of sound principle. It appears that Japan released Russian prisoners who were serving disciplinary imprisonment. 2 Oppenheim, § 275.

Exchange of prisoners (which is not dealt with by the Hague Regulations) is regulated by cartels or agreements between the belligerents. The general rule is "man for man, rank for rank, wounded for wounded."

Among savages, prisoners are often tortured and killed, sometimes sacrificed or eaten. During Antiquity and the Middle Ages, they were usually sold into slavery or ransomed. See *supra*, §§ 29, 47.

The present practice is detention or internment, occasional exchange, and release on parole, rather than confinement or imprisonment. Exchange has been rather exceptional during recent wars. See Spaight, *op. cit.*, 301–304.

A very high standard — apparently the highest yet achieved — was set by the Japanese in their treatment of Russian prisoners during the Russo-Japanese War. The Japanese methods of treatment of prisoners of war deserve special study and imitation. See Akiyama, in 38 and 39 *R. D. I.* (1906 and 1907), 567 ff. and 211 ff. respectively; Ariga, ch. 4; Hershey, 284–291, 319–324; Nagaoka, in 36 *R. D. I.* (1904), 497 ff.; * 1 Rey, ch. 5; Takahashi, Pt. II, ch. 2.

[20] *I.e.* the Geneva Convention of 1864 or 1906. H. R., 21. *Cf.* B. D., 35. The Convention of 1864 has been omitted because it will doubtless soon be obsolete.

"Subject to the treatment provided for them in pursuance of the preceding article, the sick and wounded of an army who fall into the hands of the other belligerent are prisoners of war, and the general rules of International Law concerning prisoners are applicable to them.

"However, by way of exception or favor, belligerents remain free to mutually agree upon such treatment of the sick and wounded prisoners as they may deem appropriate. In particular, they shall be at liberty to agree:

"(1) To mutually restore the wounded left on the field after a battle.

"(2) To send back to their own country any sick and wounded whom they do not wish to retain as prisoners, after having rendered them fit for removal or after their recovery.

"(3) To send to a neutral State, with the latter's consent, the sick and wounded of the enemy, to be interned by the neutral State until the end of hostilities (Art. 2)." [22]

"After each engagement the belligerent in possession of the field of battle shall take measures to search for the wounded, and to insure the protection both of the wounded and the dead against pillage and ill treatment.

"He shall see to it that a careful examination of the bodies is made before the dead are buried or cremated (Art. 3)." [23]

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[21] G. C. (1906), Art. 1. *Cf.* G. C. (1864), Art. 6. For English texts of the Geneva Conventions of 1864 and 1906 (the latter having practically supplanted the former), see Higgins, *The Hague Peace Conferences*, 8–35; and Supplement to 1 *A. J.* (1907), 90 ff. and 201 ff.; Scott, *Texts of the Peace Conferences at The Hague*, 376 ff. and 402 ff.; Holland, *Laws of War on Land*, 27–40; and Whittuck, *Int. Documents*, 3 ff. and 72 ff. For the French text, see Higgins and Whittuck.

The Geneva Convention of 1906 appears to have been signed and ratified by about half of the members of the international community, including all the Great Powers excepting France. The Conference was originally attended by delegates from thirty-five Powers. The Convention of 1864 remains binding for those Powers which have not ratified or adhered to that of 1906, provided they are signatories of the former.

[22] G. C., 2. *Cf.* G. C. (1869), Art. 6. These are obviously intended as suggestions to commanding generals who would, of course, be free to enter into such or similar agreements even in the absence of this article.

[23] G. C., 3. *Cf.* 10 H. C. (1907), Art. 16, *infra*, § 430. No such provisions as are contained in this and the following articles were made in the Convention of 1864.

" Each belligerent shall, as soon as possible, send to the authorities of their country or army the military marks or tokens of identity found on the dead, and a list of the names of the sick or wounded collected by him.

" The belligerents shall keep each other mutually informed of any internments and transfers, as also of admissions into hospitals and deaths among the sick and wounded in their hands. They shall collect all the articles of personal use, valuables, letters, etc., found on the field of battle or left by the sick or wounded who have died in the sanitary establishments or formations, in order that such articles may be transmitted to the persons interested by the authorities of their country (Art. 4)." [24]

" The military authority may make an appeal to the charitable zeal of the inhabitants to collect and, under its supervision, care for the sick and wounded of armies, granting to those persons responding to this appeal special protection and certain immunities (Art. 5)." [25]

370. **Sanitary Formations and Establishments.** — " Movable sanitary formations (that is to say, those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be respected and protected by the belligerents (Art. 26)." [26]

For the Japanese "Regulations Relative to the Clearing of the Battle-field," see Hershey, *Russo-Japanese War*, 291 ff.

[24] G. C., 4. *Cf.* H. R., 14, *supra*, § 362; and 10 H. C. (1907), 17, *infra*, § 430.

"The duties created by this article have reference, obviously, only to the dead, wounded, and sick of the enemy. The analagous duties of a belligerent with reference to his own dead, wounded, and sick are, of course, regulated by his own law." Holland, No. 45.

[25] G. C., 5. *Cf.* G. C. (1864), 5; and 10 H. C. (1907), 9.

[26] G. C., 6. *Cf.* G. C. (1864), 1; and 10 H. C. (1907), 1. The Geneva Convention of 1864 made use of the terms "ambulances" and "military hospitals." For these terms, the present Geneva Convention of 1906 substitutes the expressions "sanitary formations and establishments."

"Throughout the treaty the term ' sanitary formation ' is applied to all establishments, whether fixed or movable, which are provided by public appropriation or private charity for the treatment of the sick or wounded in time of war. To each of the movable sanitary formations a surgical and administrative personnel is attached; tents, bedding, ambulances and other means of transportation are provided, together with a sufficient equipment of surgical instruments and medical and hospital supplies." Davis, in 1. *A. J.* (1907), 411–412.

Holland (No. 47) prefers the term "mobile medical units" to "movable sanitary formations." They include "all organizations which follow the troops on the field of battle (described in the British army as 'bearer companies' or 'field hospi-

"The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy (Art. 7)."[27]

"The following facts are not considered to be of such a nature as to deprive a sanitary formation or establishment of the protection guaranteed by Article 7:

"(1) That the personnel of the formation or establishment is armed, and that it uses its arms for its own defence or for that of its sick and wounded.

"(2) That in default of armed hospital attendants, the formation or establishment is guarded by an armed detachment or by sentinels duly authorized.

"(3) That arms or cartridges taken from the wounded and not yet handed over to the proper authority are found in the formation or establishment (Art. 8)."[28]

371. **Personnel.**—"The personnel engaged exclusively in the collection, transportation, and treatment of the sick and wounded, as also in the administration of the sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstaances. If they fall into the hands of the enemy, they shall not be treated as prisoners of war.

"These provisions apply to the personnel of the guard of the sanitary formations and establishments under the circumstances indicated in Article 8, No. 2 (Art. 9)."[29]

"The personnel of Voluntary Aid Societies, duly recognized and authorized by their Government, who are employed in the sanitary formations and establishments of armies, is assimilated to the personnel referred to in the preceding article, provided

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tals'); while 'fixed establishments' . . . would cover 'stationary' or 'general' hospitals (whether actually movable or not), placed on a line of communications, or at a base. Units of both kinds are to be 'respected,' *i.e.* not to be fired upon; and 'protected' afterwards in the discharge of their duties." *Cf.* Spaight, 436–439.

[27] G. C., 7. *Cf.* G. C. (1864), 1; and 10 H. C. (1907), 8.

[28] G. C., 8. *Cf.* 10 H. C., 8.

[29] G. C., 9. *Cf.* G. C. (1864), 2; 3 H. C. (1899), 7; and 10 H. C. (1907), 10.

"The persons here mentioned are bound to carefully abstain not only from acts of hostility against the enemy, but also from all acts, such as transmission of letters or messages, calculated to impede the success of operations." Holland, No. 50.

"It would seem that the domestics of the sanitary personnel should receive the same treatment as themselves, but this is subject to some doubt." Bordwell, 256.

always that the said personnel shall be subject to military laws and regulations.

"Each State shall make known to the other, either in time of peace or at the commencement of or during the course of hostilities — but in any case before actually employing them — the names of the Societies which it has authorized, under its responsibility, to render assistance to the regular sanitary service of its armies (Art. 10)." [30]

"A recognized Society of a neutral country can only afford the assistance of its sanitary personnel and formations to a belligerent with the previous consent of its own Government and the authorization of the belligerent concerned.

"The belligerent who has accepted such assistance is bound to notify the fact to his enemy before making any use thereof (Art. 11)." [31]

"The persons designated in Articles 9, 10, and 11 shall continue, after they have fallen into the hands of the enemy, to carry on their duties under his direction.

"When their assistance is no longer indispensable, they shall be sent back to their army or their country within such time and by such route as may be compatible with military necessity.

"They shall then take with them such effects, instruments, arms, and horses as are their private property (Art. 12)." [32]

"While in his hands, the enemy shall secure to the personnel referred to in Article 9 the same allowances and the same pay as are granted to the persons holding the same rank in his own army (Art. 13)." [33]

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[30] G. C., 10. *Cf.* 3 H. C. (1899), 2; and 10 H. C. (1907), 2.

"This article makes it quite clear that Red Cross, or Aid, Societies, unless affiliated to the regular medical organization of one or the other belligerent, and subject to its military law, enjoy none of the benefits conferred by the Convention. . . . It makes no difference whether or not they are recognized by the Government of the State to which they belong, as available when needed for service with its own armies." Holland, No. 51. *Cf.* Spaight, 442.

[31] G. C., 11. *Cf.* 3 H. C. (1899), 3; and 10 H. C. (1907), 3. See Spaight, 442–443.

[32] G. C., 12. *Cf.* G. C. (1864), 3, 4; 3 H. C. (1899), 7; 10 H. C. (1907), 10. "Under Article XII, the *personnel* who fall into the enemy's hands may be forced by him to carry on their duties so long as their services are indispensable." Spaight, 443–444. *Cf.* Bordwell, 259.

[33] G. C., 13. *Cf.* 3. H. C. (1899), 7; 10 H. C. (1907), 10; and H. R., 17. This article does not apply to Aid Societies.

372. **Material.** — "If movable sanitary formations fall into the hands of the enemy, they shall retain their material, including their teams, irrespective of the means of transport and the driver employed.

"Nevertheless, the competent military authority shall have the right to use the material for the care of the sick and wounded. It shall be restored under the conditions laid down for the sanitary personnel, and, so far as possible, at the same time (Art. 14)." [34]

"The buildings and material of fixed establishments remain subject to the laws of war, but they may not be diverted from their purpose so long as they are necessary for the sick and wounded.

"Nevertheless, the commanders of troops in the field may dispose of them, in case of urgent military necessity, provided they make previous arrangements for the welfare of the sick and wounded who are found there (Art. 15)." [35]

"The material of Voluntary Aid Societies which are admitted to the benefits of the Convention in conformity with the conditions herein prescribed, is considered private property, and, as such, is to be respected under all circumstances, saving only the right of requisition as recognized by belligerents according to the laws and usages of war (Art. 16)." [36]

373. **Convoys of Evacuation.** — "Convoys of evacuation shall be treated like movable sanitary formations, subject to the following special provisions:

"A belligerent intercepting a convoy may break it up if military necessity requires it, provided he takes charge of the sick and wounded who are in it.

"In this case, the obligation to send back the personnel, provided for in Article 12, shall be extended to the entire military personnel detailed for the transport or the protection of the convoy and furnished for this purpose with an authority in due form.

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[34] G. C., 14. *Cf.* G. C. (1864), 4. "This article cannot be supposed to debar the capturing commander from using, in case of necessity, some of the material of a medical unit (sanitary formation) for the benefit of his own wounded." Holland, No. 55. *Cf.* Bordwell, 260.

[35] G. C., 15. *Cf.* 10 H. C. (1907), 7.

"The provisions of this article, it must be observed, relate only to military establishments and material. Civil hospitals, even when State property, would be exempt from confiscation." Holland, No. 56. *Cf.* Bordwell, 261.

[36] G. C., 16. "Medical stores, drugs, etc., except those held by a mobile medical unit (movable sanitary formation) or a convoy of evacuation, are not protected by the Convention, and are subject to seizure just like any other army property." Spaight, 449. *Cf.* Bordwell, 262–263.

" The obligation to restore the sanitary material, provided for in Article 14, shall apply to railway trains and boats used in internal navigation which are specially arranged for evacuations, as also to the material belonging to the sanitary service for fitting up ordinary vehicles, trains, and boats.

" Military vehicles, other than those of the sanitary service, may be captured with their teams.

" The civilian personnel and the various means of transport obtained by requisition, including railway material and boats used for convoys, shall be subject to the general rules of the Law of Nations (Art. 17)." [37]

374. **The Distinctive Emblem of the Red Cross.** — " As a compliment to Switzerland, the heraldic emblem of the Red Cross on a white ground, formed by reversing the federal colors, is retained as the emblem and distinctive sign of the sanitary service of armies (Art. 18)." [38]

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[37] G. C., 17. "Convoys of Evacuation" are convoys of sick and wounded in course of conveyance. Such convoys are no longer protected by an "absolute neutrality." *Cf.* G. C. (1864), 6. For valuable comments on G. C., 17, see Holland, No. 58; Fauchille et Politis, *Manuel de la Croix-Rouge*, 66–69; and Spaight, 451–454.

So-called "mixed or composite trains," consisting of both sick, and of wounded and military men or material, are not protected. An interesting case occurred during the Russo-Japanese War. See Hershey, 302; and Lawrence, *War and Neutrality*, 43–44. *Cf.* Ariga, § 48; and Takahashi, 154–158. See also Spaight, 452–454.

[38] G. C., 18. *Cf.* G. C. (1864), 7. "The phraseology of this article is intended to make it clear that the device has no religious significance, such as has been attributed to it by Mohammedan troops; so much so that although Turkey had signed the original Convention in 1865, it was thought desirable by that Power to distinguish its own medical services, in the wars of 1876 and 1879, by a Red Crescent, while undertaking to continue to respect the Red Cross in the service of the enemy.

"Turkey, the only important Power not represented at the Conference of 1906, acceded to the Geneva Convention of that year, on August 24, 1907, with, however, the reservation 'that its armies will use the emblem of the Red Crescent for the protection of the ambulances'; adding, 'it is nevertheless well understood that the Imperial Government will scrupulously respect the inviolability of the Red Cross flag.' " Holland, No. 59.

For violations of the Geneva Convention by the Turks during the Turco-Russian War of 1877–1878, see F. de Martens, *La paix et la guerre* (1901), ch. 8.

"With the permission of the competent military authority, this emblem shall be shown on the flags and armlets (*brassards*), as well as on all the material belonging to the sanitary service (Art. 19)." [39]

"The personnel protected in pursuance of Articles 9 (paragraph 1), 10, and 11 shall wear, fixed to the left arm, an armlet (*brassard*) with a Red Cross on a white ground, delivered and stamped by the competent military authority, and accompanied by a certificate of identity in the case of persons who are attached to the sanitary service of armies, but who do not have a military uniform (Art. 20)." [40]

"The distinctive flag of the Convention shall only be hoisted over those sanitary formations and establishments which are entitled to be respected under the Convention, and with the consent of the military authority. It should be accompanied by the national flag of the belligerent to whom the formation or establishment belongs.

"Nevertheless, sanitary formations which have fallen into the hands of the enemy, so long as they are in that situation, shall not fly any other flag than that of the Red Cross (Art. 21)." [41]

"The sanitary formations belonging to neutral countries which may be authorized, under the conditions laid down in Article 11, should fly the national flag of the belligerent to which they are attached, along with the flag of the Convention.

The representatives of Japan, China, Persia, and Siam expressed a willingness to accept the Red Cross, but at the Second Hague Peace Conference, Persia reserved the right to use the Lion and Red Sun.

[39] G. C., 19.

[40] *Ibid.*, 20. *Cf.* G. C. (1864), 7. "A Register should be kept of the names and descriptions of the persons to whom these badges have been issued. Such persons, if not wearing a military uniform, should be furnished with an official certificate, bearing a number and a date corresponding with entries in the Register." Holland, No. 61.

The arm badge is not always a prerequisite to protection, since they need not be worn by those temporarily in the sanitary service, as in the case of pickets or guards, litter-bearers, etc. Bordwell, 264.

[41] G. C., 21. "Article 21 makes it clear that the Red Cross flag must not be hoisted over civil hospitals or any buildings or ambulances other than those referred to in the Convention. . . . It has, however, been the practice for civil hospitals to fly the Geneva flag, especially in bombarded towns." Spaight, 456–457.

"No national flag, it will be observed, is to be flown by a medical unit (formation) while in captivity. It may, however, be supposed that an invader will hoist his own flag, accompanied by that of the Red Cross, over hospitals which he may find in the territory of which he is in occupation." Holland, No. 62.

"The provisions of the second paragraph of the preceding article are applicable to them (Art. 22)." [42]

"The emblem of the Red Cross on a white ground and the words 'Red Cross' or 'Geneva Cross' shall not be used, either in time of peace or in time of war, except to protect or to indicate the sanitary formations and establishments, the personnel and material protected by the Convention (Art. 23)." [43]

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[42] G. C., 22. Though not expressly prohibited, it would seem to be the intent of this article to discourage, if not to prevent, neutral sanitary formations from flying their own national flag. Such, however, has been the practice. Spaight, 458.

Holland (No. 63) says *apropos* of this article: "The only flags which, under any circumstances, can be flown by neutral Aid Societies are, it will be observed, that of the Red Cross, and that of the belligerent to whose army they are attached. In captivity they can fly only the Red Cross flag."

[43] G. C., 23. In Article 27 the Signatory Powers agreed to "adopt, or to propose to their legislative bodies, such measures as may be necessary to prevent at all times the employment of the emblem or the name of 'Red Cross' or 'Geneva Cross' by private individuals, or by Societies other than those which are entitled to do so under the present Convention, and in particular for commercial purposes as a trade mark or trading mark."

In Article 28 they undertook to adopt or propose to their legislative bodies "measures necessary for the repression in time of war of individual acts of pillage and maltreatment of the sick and wounded of armies, as well as for the punishment, as an unlawful employment of military insignia, of the improper use of the Red Cross flag and armlet (*brassard*) by soldiers or private individuals not protected by the present Conventions."

Art. 25, 27, and 28 were not accepted by Great Britain. The United States appears to have at least complied with the requirements of Article 27. 33 Stat. at Large, 600, cited by Bordwell, 267.

The remaining articles of the Geneva Convention of 1906 relate to the application, execution, ratification, etc., of the Convention. Article 24 declares that it is "only binding upon the Contracting Powers in case of war between two or more of them." Article 25 provides that "the Commanders in Chief of belligerent armies shall arrange the details for carrying out the preceding Articles, as well as for cases not provided for, in accordance with the instructions of their respective Governments and in conformity with the general provisions of the present Convention." In Article 26 the Signatory Governments agree that they will "take the necessary measures to instruct their troops, expecially the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population."

On the *Geneva Convention of 1906*, see * Bordwell, *Law of War* (1908), Pt. II, ch. 5; Delpech, in 13 *R. D. I. P.* (1906), 629 ff.; Davis, in *A. J.* (1907), 409–417; Fauchille et Politis, *Manual de la Croix Rouge* (1908); * Holland, *The Law of War on Land* (1908), 27–40; *Ibid.*, in *Fortn. Review* for August, 1907; * Higgins, *The Hague Peace Conferences* (1808), 18–38; Meurer, in 1 *Zeitschrift* (1906), 521 ff.; * Spaight, *War Rights on Land* (1911), ch. 13.

4. Means of Injuring the Enemy on Land

375. **Means of Injuring the Enemy.** — " The right of belligerents to adopt means of injuring the enemy is not unlimited." [44]

376. **Preamble to Declaration of St. Petersburg on Explosive Bullets.** — The Conference of military delegates from the European Powers and Brazil, which met at St. Petersburg in 1868, adopted the following Declaration and Preamble:

" Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

" That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

" That for this purpose it is sufficient to disable the greatest possible number of men;

" That this object would be exceeded by the employment of arms which would needlessly aggravate the sufferings of disabled men, or render their death inevitable;

" That the employment of such arms would, therefore, be contrary to the laws of humanity;

" The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes (nearly fourteen ounces avoirdupois), which is either explosive or charged with fulminating or inflammable substances." [45]

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[44] H. R., 22. *Cf.* B. D., 12. This declaration may be regarded as a solemn and official denial or repudiation of the doctrine of the *Kriegsraison* or military necessity (see *supra*, § 336), as enunciated by leading German publicists and set forth in the *Kriegsgebrauch im Landkriege* (1902), a German manual on the "Usages of Land Warfare," published by the historical section of the German Chief of Staff. (For a French translation, see Carpentier, *Les lois de la guerre continentale* (1904).)

If Germany ever attempts to put some of these doctrines into practice, she will have to confront the general reprobation of the civilized world. For a criticism of these doctrines, see Mérignhac, in 14 *R. D. I. P.* (1907), 197–239.

[45] " It is now very generally thought that clauses 2 and 3 of these Recitals are capable of being so read as to limit too narrowly the legitimate methods of making war." Holland, 41.

However this may be, "the civilized world has signed and sealed its approval of two great principles — the first, that the sole end of war is the overcoming of the military forces of the enemy; the second, that, to the means which may be adopted to secure this end, certain restrictive laws apply." Spaight, 75.

377. **The Hague Declarations on** (I) **Projectiles and Explosives from Balloons.** — "The great majority of the Powers represented at the First Hague Conference of 1899 signed the following Declarations:

"The Contracting Powers agree to prohibit, *for a term of five years*, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." For the phrase "for a term of five years," the Conference of 1907 substituted the expression "*for a period extending to the close of the Third Peace Conference.*"[46]

378. (II) **On Asphyxiating or Deleterious Gases.** — "The Contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."[47]

It should be noted that the only application made of the principles laid down in the Preamble to the Declaration of St. Petersburg is the prohibition of the use of explosive projectiles of a weight below 400 grammes, *i.e.* in bullets, not in shells. The Russian military authorities had invented a bullet which exploded on contact with either a hard or soft substance. The Russian Government was willing to forego the use of this dangerous explosive bullet, provided the other European Powers entered into a reciprocal engagement. This explains the immediate object of the Conference.

On the *Conference and Declaration of St. Petersburg of 1868*, see especially: Bordwell, 87–88, 278–79; *Higgins, 5–7; Holland, 41, 77–78; *Ibid.*, *Studies*, 66–67; F. de Martens, *La paix et la guerre*, 87–91; Mérignhac, Nos. 82–83; Pillet, No. 51; Spaight, 74 ff.; 2 Westlake, 53–55.

[46] H. D. (1899 and 1907), 1. "This Declaration, having been originally drafted in 1899 by the First Peace Conference to operate for five years only, expired by the efflux of time. It had been ratified by almost all the Powers represented, except Great Britain and the United States. As redrafted in 1907 by the Second, it is to remain in force to the end of the Third Conference." Holland, No. 73.

The Declaration of 1907 was signed and ratified by both Great Britain and the United States, but among the seventeen non-signatory Powers upon whom it is not binding are Germany, France, Italy, Japan, and Russia. Consequently, it can scarcely be deemed an integral part of the Law of Nations.

"It was generally conceded at the Conference that balloons must not be allowed to attack undefended places; but it was thought that this was sufficiently provided for by the words 'by any means whatever,' now inserted in Art. 25 of the Hague Regulations." Holland, No. 73. *Cf. infra*, § 382.

[47] H. D. (1899), 2. Holland (No. 74) adds by way of comment: "This, and the following Declaration are, unless denounced, of perpetual obligation. They were ratified or acceded to by almost all the Powers represented at the Conference of 1899, except Great Britain, the United States, and Portugal, which, however, in the course of the proceedings of the Conference of 1907, signified their adhesion to both Declarations." This statement is inaccurate. The United States has not signed either of these Declarations. "It has been signed by all the other Powers

379. (III) **On Expanding Bullets.** — "The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions." [48]

380. **The Hague Prohibitions.** — "Besides the prohibitions established by special Conventions,[49] it is particularly forbidden:

"(*a*) To employ poison or poisoned weapons;[50]

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represented at the First Peace Conference, but not by those which were represented only at the second." Higgins, 493.

For the objections of the United States as expressed by Captain Mahan, see Higgins, 493; and Holls, 119.

[48] H. D. (1899), 3. This declaration was really aimed at the famous dumdum bullet so named from the arsenal near Calcutta where it was first made. It appears to have been designed for use against savages or barbarians whose wild onslaughts, it was claimed, could not be checked by ordinary bullets.

At the Conference of 1899, Captain Crozier of the American Delegation submitted an amendment which forbade the use of all bullets "which inflicted wounds of useless cruelty, such as explosive bullets and, in general, every kind of bullet which exceeds the limit necessary for placing a man *hors de combat*." Holls, 103. This amendment had the support of Great Britain, but it failed of adoption. Consequently, both the United States and Great Britain withheld their signatures from the Declaration — a position which, however, has since been abandoned by Great Britain.

At the Conference of 1907, General Davis attempted to secure the consideration for a proposition couched in terms identical with Captain Crozier's amendment, but he was ruled out of order. Davis, in 2 *A. J.* (1908), 77.

The United States appears to be the only Power represented at the First Hague Conference which has not signed this Declaration.

On the *Hague Declarations*, see especially: Bodin, 100–115; Bonfils (Fauchille), Nos. 1069, 1440 ^{3}; Bordwell, 130–135, 279–280; Bustamante y Sirven, ch. 11; Davis, in 2 *A. J.* (1908), 74–77, 528–29; *Higgins, 484–497; Holland, 41–42, 80–81; *Holls, 93–120, 506–514; Lawrence (4th ed.), § 205; Lémomon, 382–394; 1 Scott, 60–61, 649–654; *Spaight, 79–81, 101–103; 2 Westlake, 110, 274.

For complaints of the use of explosives and dumdum bullets during the Anglo-Boer and Russo-Japanese Wars, see Ariga, §§ 65, 71; Bordwell, 138–140; Despagnet, *La guerre sud-africaine, passim;* Hershey, 316–318; Takahashi, 173–174.

They were probably exceptional and isolated instances.

[49] *I.e.* the Declaration of St. Petersburg and the Hague Declarations referred to in the preceding sections, "and any others which may have been or may be concluded, whether generally or between particular Powers." 2 Westlake, 72–73.

[50] H. R., 23 a. *Cf.* B. D., 13 a. The prohibition of the use of poisoned weapons is at least as old as the Laws of Manu. See *supra*, § 20.

It appears that "cutting off an enemy's water supply is an allowable act of war." Spaight, 84. It has been suggested, on analogy, that the prohibition of poison extends to the spread of contagious diseases, and this is probably the case.

" (*b*) To kill or wound treacherously individuals belonging to the hostile nation or army; [51]

" (*c*) To kill or wound an enemy who, having laid down his arms, no longer having means of defense, has surrendered at discretion;

" (*d*) To declare that no quarter will be given; [52]

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[51] H. R., 23 b. "This includes not only assassination of individuals, but also by implication, any offer for an individual 'dead or alive.'" Holland, No. 76.

"Modern International Law distinguishes between dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies, and similar attempts made by those who disguise their enemy character. A man who steals secretly into the opposing camp in the dark, and makes alone, or with others, a sudden attack in uniform upon the tent of king or general, is a brave and devoted soldier. A man who obtains admission to the same tent disguised as a pedlar, and stabs its occupant when lured into a false security, is a vile assassin, and the attempt to procure such murder is as criminal as the murder itself." Lawrence (4th ed.), § 208. See also Art. 148 of the *American Instructions*.

"It is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act which, had he come under his true colors, he could not have done." Spaight, 87. See *Ibid.*, 88, for examples.

[52] H. R., 23 d. "It may be a question up to what moment acts of violence may be continued without disentitling the doer to be ultimately admitted to the benefit of quarter under this clause." Holland, No. 86.

"The admitted case in which it (quarter) is not practicable is that which occurs during the continuance of fighting, when the achievement of victory would be hindered and even endangered by stopping to give quarter instead of cutting down the enemy and rushing on, not to mention that during fighting it is often impracticable so to secure prisoners as to prevent their return to the combat. Hence it is especially difficult to avoid ruthless slaughter in the storm of a place or position, but the rule formerly dictated by military pride that those are not entitled to quarter who insult a superior force by defending a place after a breach has been made and the counterscarp thrown in, or who defend an ill-fortified place at all against a superior force, is entirely obsolete and condemned." 2 Westlake, 75. *Cf.* Hall (6th ed.), 392–394 n.; and Lawrence (4th ed.), § 163.

The right of a commander to refuse quarter or to destroy prisoners "in case of imperative necessity, when there is no other means of keeping them and their presence constitutes a danger to the very existence of the captors," is still asserted by some authorities, notably in Germany. *Kriegsgebrauch im Landkriege*, 16, or Carpentier (French trans.), 36. Westlake (II, 76) agrees with Hall (392) that "prisoners who cannot safely be kept can be liberated." The Boers acted in this manner during the Anglo-Boer War. For examples of the difficulty of giving quarter or accepting surrender under certain circumstances, see Spaight, 91 ff.

"Willingness to surrender is usually indicated by the hoisting of a white flag, or some improvised substitute for it, but there is no settled procedure in this matter. Some troops throw down their arms; others hold up their hands (such was the Boer practice). The Prussian appeal for mercy in 1870 was to raise the butt end of the needle gun; this the French considered insufficient and made them fall on their knees. In the war of 1904 the Russians sometimes went to the length of embracing the enemy to whom they wished to surrender. There are so many diverse ways of indicating surrender that it seems desirable for one universal proce-

" (*e*) To employ arms, projectiles, or material of a nature to cause superfluous injury;[53]

" (*f*) To make improper use of a flag of truce, of the national flag, or of military insignia and uniform of the enemy, as also the distinctive signs of the Geneva Convention;[54]

" (*g*) To destroy or seize enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[55]

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dure to be settled by international agreement." Spaight, 95. See Ariga, § 29, for several amusing incidents which occurred during the Russo-Japanese War.

[53] H. R., 23 e. This is virtually an enactment into law of the principles laid down in the Declaration of St. Petersburg. *See supra*, § 376.

Such forbidden missiles are "understood to include glass, nails, and bits of iron of irregular shape. Many writers include red-hot shot in the prohibition, which may be admitted when they would be directed only against men. . . ." 2 Westlake, 76.

"Explosive hand grenades, which were freely used in the Russo-Japanese War, as they were in the Crimean and Secession Wars, are not held to come under the prohibition of explosive bullets. Nor is there anything illegitimate in the use of [mines or] torpedoes in land war." Spaight, 81.

[54] H. R., 23 f. *Cf.* H. R., 24, *infra*, § 381. There is some controversy as to what constitutes an "improper" use of the enemy's flag or uniform. The older jurists maintained that it is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it was held that "soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing." Hall (6th ed.), 534. *Cf.* Bluntschli, Art. 565; Bordwell, 283–284; 4 Calvo, No. 2106; Longuet, 54; Pillet, No. 55; and Taylor, § 488.

There is now a growing tendency on the part of publicists to reject the view that the enemy's flag or uniform may be used for purposes of approach. See, *e.g.* Bonfils (Fauchille), No. 1074; Lawrence (4th ed.), § 207; Lueder, in 4 Holtzendorff, 458; Mérignhac, No. 89; 6 P.-Fodéré, No. 2760; and Spaight, 104 ff. I agree with Oppenheim (II, § 164) that Art. 23 f. of the Hague Regulations has left this question open.

"Troops may sometimes be obliged by lack of clothing, and with no fraudulent intent, to make use of uniforms belonging to the enemy. Care must be taken in such cases to make alterations in the uniform which will clearly indicate the side to which those who wear it belong." Holland, No. 79.

For examples of wearing enemy's uniforms during recent wars, see Spaight, 106–110. For instances during the Russo-Japanese War, see Ariga, §§ 67-68; Hershey, 306–307; Takahashi, 174–178.

[55] H. R., 23 g, "refers to pillage as distinguished from requisitions, and to devastation not directly necessary for a military purpose." 2 Westlake, 76. *Cf.* H. R., 46–47, 51–52, *infra*, §§ 389–392, 394–395.

"It may be taken for granted that the necessities of war include the destruction of whatever property interferes with the operations of a conflict, an advance or a retreat." But "it is clear that the necessity must be fairly direct and immediate." Lawrence (4th ed.), § 206, p. 549. "Devastation pure and simple, as an end in itself, as a self-contained measure of war, is not sanctioned by war law. Permissible devastation presents itself invariably as a means to a military end, as a factor in a legitimate operation of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. To destroy with the intention of damaging the hostile Government's pocket is illegitimate. . . . Devastation as an operation of war *per se* may be said to be wholly obsolete." Spaight, 112.

But destruction of enemy property, which is incidental to a military operation or necessary for purposes of offense and defense, is justified. This includes "war *material* and army supplies generally; property situated on the anticipated field of battle or in the zone of actual fighting; railways, telegraphs, etc., which are used by the enemy for his operations; . . . barracks, military storehouses, factories, and *depôts*, iron foundries and railway workshops which may be used to supply the enemy's army." *Ibid.*, 128. *Cf.* 2 Oppenheim, § 150. For exceptions, see H. R., 56, *infra*, § 399.

The general devastation of a particular district or the destruction of a whole town is only permissible in extreme cases, as, *e.g.* if self-preservation should compel a belligerent to resort to severe measures in face of a threatened levy *en masse*, or "when, after the defeat of his main forces and occcupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands." 2 Oppenheim, § 154.

The right of general devastation has been denied under any and all circumstances. But this position can scarcely be reconciled with modern practice. Generals Sherman and Sheridan did not hesitate to destroy the granaries of the Southern armies in Georgia and the Shenandoah Valley during the Civil War, and during the Anglo-Boer War the British destroyed Boer farms on a large scale. Vattel (liv. III, § 167), writing in the eighteenth century, still permitted devastation "for making a barrier, for covering a frontier against an enemy who cannot be stopped any other way." But, as Lawrence (4th ed., p. 548) says, such action "would now be held up to the execration of the civilized world."

In case devastation on a large scale is found imperative, the best possible provision should be made for the dispossessed inhabitants. In several recent wars they have been herded in concentration or internment camps — a mode of procedure which has been criticised on the ground that non-combatants should not be made prisoners. As pointed out by Spaight (p. 307), "generally speaking, the objection taken to such camps is sound in principle," and "such an extreme measure is only to be justified by very extreme circumstances." The internment of the Boers in concentration camps by the British in 1901 was accompanied by a "terribly" high death rate, and met with severe criticism. The fearful sufferings of the Cubans which resulted from the reconcentration order of General Weyler in 1896 (see Benton, *Int. Law and Diplomacy of the Spanish-American War*, 1908, p. 27) was one of the main causes of intervention by the United States. See also 7 Moore, *Digest*, § 1126. Yet it is better to provide concentration camps for non-combatants than to turn them adrift as did General Sherman when he burnt Atlanta in 1864. At least some of the evils which have hitherto been incident to concentration camps might be avoided by proper sanitary precautions and a more efficient management.

On *Devastation*, see especially Bordwell, 284; 4 Calvo, §§ 2215 ff.; * Hall (6th ed.), 529–532; Holland, 13–14, 43–44; * Lawrence (4th ed.), § 207; 7 Moore, *Digest*, § 1123; * 2 Oppenheim, §§ 149–154; 6 P.-Fodéré, Nos. 2770–2774; * Spaight, 111–140, 307–310; Taylor, §§ 481–482; Wheaton, §§ 347–351.

For defenses of the devastations of Generals Sherman and Sheridan, see Bordwell, 77–79; and Spaight, 133–136.

"(h) To declare extinguished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.[56]

"A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even when they have been in his service before the commencement of the war." [57]

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[56] H. R. (1907), 23 h. The meaning of this paragraph seems doubtful. If interpreted literally, it involves a clear denial of the Anglo-American doctrine that an alien enemy has no standing in court. This appears to have been the only view expressed in the discussions at the Hague Conference itself (see Higgins, 263–265), and this view is supported by Bonfils (Fauchille), No. 1065; Bordwell, 210, 284–285; Kohler, in 5 *Zeitschrift* (1911), 384 ff.; Lawrence (4th ed.), § 143; Phillipson, *Effect of War on Contracts* (1909), 46; Politis, in 18 *R. D. I. P.* (1911), 384 ff.; Ullmann, 474; and Whittuck, *Int. Doc.*, p. xxvii.

General Davis, on the other hand, is of the opinion that it is merely one of a number of "reasonable and wholesome restrictions upon the authority of commanding generals and their subordinates in the theater of belligerent activity." Davis, in 2 *A. J.* (1908), 70. For a similar opinion expressed by Sir E. Grey in behalf of the British Government, see 5 *Zeitschrift* (1911), 389–391. This view is shared by Spaight, 140–142.

Professor Holland (No. 76) furnishes the following valuable comment:

"This clause, suggested by Germany, if intended only for the guidance of an invading commander, needs careful redrafting; if, as would rather appear, it is of general application, besides being quite out of place where it stands, it is so revolutionary of the doctrine which denies to an enemy any *persona standi in judicio*, that although it is included in the ratification of the Convention by the United States on March 10, and the signature of the same on June 29, 1908, by Great Britain, it can hardly, till its policy has been seriously discussed, be treated as a rule of International Law." *Cf.* Holland, in 28 *L. Q. R.* (1912), 94 ff.

Considering the form and manner of its adoption, it is difficult to avoid the conclusion that the clause is one of general application and constitutes an international obligation. But legislation is probably needed to carry it into effect, at least in England and the United States. It is, of course, highly desirable that it be recognized as a rule of International Law. For a very convincing argument in favor of so treating it, see Politis, in 14 *R. D. I. P.* (1911), 249 ff. See also 5 *Zeitschrift* (1911), 384 ff.

[57] H. R. (1907), 23 h. *Cf.* H. R. (1899 and 1907), 44. "This article, drafted by Germany, was in 1907 rather awkwardly annexed to H. R., 23, in substitution for Art. 44 of H. R. of 1899, which ran as follows: 'any compulsion on the population of occupied territory to take part in *military operations* against its own country is prohibited.' The immunity now accorded to subjects of the invaded States is considerably greater than that guaranteed by the old articles. In the first place, it relates to taking part in any *operations of war*, a term supposed to cover many acts not amounting to what would be described as *military operations*. An Austrian amendment which would have limited the exemption to taking part 'as combatants,' was accordingly rejected. In the second place, the subjects of that State are protected against compulsion to take part against their own country, even if they have previously been enrolled in the service of the invader.

381. **Ruses or Strategems.** — "Ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered lawful (Art. 24)."[58]

382. **Sieges and Bombardments.** — "The attack or bombardment, *by any means whatever*, of towns, villages, dwellings, or buildings which are undefended, is prohibited (Art. 25)."[59]

"The Commander of an attacking force, before commencing

"The terminology employed is, however, still ambiguous. Would this article render unlawful any compulsion on inhabitants of occupied territory to execute urgently required works, such as, *e.g.* repairs to roads or bridges, although of ultimate military utility? A still more delicate question is whether it would protect the inhabitants from being compelled to act as guides to the enemy. The practice of exacting services of this kind was reprobated by many Powers at the Conference, but is still treated as admissible in 1902, by the *Kriegsgebrauch* of the Prussian General Staff, p. 48. It must be noted that Germany, with several other first-class Powers, declines to accept H. R., 44." (See *infra*, § 389.) Holland, No. 77. *Cf.* Higgins, 265–269, 368–371; and Spaight, 142–152.

Holland (No. 112) also thinks that the phrase *operations of war* "would probably not comprise works at a distance from the scene of hostilities," *e.g.*, fortifications. On this point he is surely mistaken, though this was the view of the older jurists. There can be little doubt that H. R., 23 h. and 44, in principle at least, also apply to the use of forced guides. *Cf. infra*, § 389.

On the other hand, the invading army may utilize the services of the inhabitants of the invaded or occupied district for transporting supplies, repairing roads or bridges, caring for the wounded, burying the dead, etc. "It is only such acts as are directly and distinctly subservient to military operations — such as building fortifications, making munitions, repairing arms, or giving information as to the enemy's position and numbers — that an invader is forbidden to demand of the 'passive enemy.'" Spaight, 152.

"Before quitting the Means of Injuring the Enemy, we must notice that it is considered unlawful to incite the enemy's troops to treason or desertion, a rule which was probably introduced for the mutual convenience of commanders and by a kind of chivalry between them, and which should carry with it the unlawfulness of enrolling deserters as recruits; also the allied rule that communications intended for the enemy can only be made to the highest officer in rank who is within reach. But it is not considered unlawful to stir up insurrection in the enemy's country. The projects of France in 1859 and of Prussia in 1866 to enrol Hungarian legions seem to be on the very border between incitement to desertion and incitement to insurrection." 2 Westlake, 76.

[58] H. R., 24. *Cf.* B. D., 14 and H. R., 44. "Good faith must, however, always be observed with the enemy, and this article must not be taken to authorize any such acts of treachery as are expressly forbidden." Holland, No. 78. *Cf.* H. R., 23 b and f, *supra*, § 380. Ruses of war or strategems are considered unobjectionable "provided they do not involve treachery or a breach of an express or tacit convention." Spaight, 152. For examples of permissible ruses, see *Ibid.*, 153–156; and 2 Oppenheim, § 164.

A distinction must be here drawn between treachery or perfidy and mere deceit. The former are prohibited, the latter permitted. "War is a conflict of wits quite as much as a conflict of arms." Lawrence (4th ed.), p. 533.

[59] H. R., 25. *Cf.* B. D., 15; 9 H. C. (1907), 1. The phrase *by any means*

a bombardment, except in case of an assault, should do all in his power to warn the authorities (Art. 26)." [60]

"In sieges and bombardments all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, art, science, and charity, *historic monuments*, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

"It is the duty of the besieged to indicate these buildings or places by some special visible signs, which shall previously be notified to the assailants (Art. 27)." [61]

"The giving up to pillage of a town or place, even when taken by assault, is forbidden (Art. 28)." [62]

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whatever was inserted in 1907 in order to cover the bombardment of undefended towns, etc., by projectiles from balloons or airships. *Cf.* 1 H. D., *supra*, § 377.

"The first Declaration of 1899 against the discharge of projectiles and explosives from balloons, a Declaration which was not limited to undefended places, was renewed in 1907, but it has not been accepted by many of the great military Powers." Higgins, 270 and 491.

"A place, although not fortified, may be bombarded if it is defended. This article is not to be taken to prohibit the use of any means for the destruction of buildings for military reasons. A place must not be bombarded with a view merely to the exaction from it of ransom." Holland, No. 80. *Cf.* 9 H. C. (1907), 4, *infra*, § 435.

It appears that a place may also be bombarded if simply *occupied*, though not actually defended by the enemy. Spaight, 161.

"As war law now stands one may say that an undefended city, unoccupied by troops and not situated within the perimeter of defense of a neighboring fort or forts, may be bombarded in land war only in three cases and in those three cases only *if it is absolutely impossible to obtain the end in view by milder means:* the three cases being: (1) the destruction of military stores, factories, etc.; (2) to secure compliance with legitimate requisitions; and (3) — a very doubtful case — to inflict punishment, by way of reprisals, for infractions of the laws of war on the part of the enemy." *Ibid.*, 170. *Cf.* Holland, *Studies*, 110.

[60] H. R., 26. *Cf.* B. D., 16. "By 'assault,' a surprise attack is here intended. The besieger is under no absolute obligation to allow any portion of the population of a place to leave it, even when a bombardment is about to commence." Holland, No. 81.

"On the other hand, to refuse exit to the non-combatants of a town which it is proposed to reduce by bombardment or assault, and not by famine, is to inflict unnecessary suffering on persons who are protected by the laws of war." Spaight, 174. There appears to be no doubt that a usage is growing up in favor of the free exit of "useless mouths." For examples, see *Ibid.*, 175 ff.

[61] H. R., 27. *Cf.* B. D., 17; and 9 H. C. (1907), 3 and 5.

"Thus firing on the houses of a fortified town is not forbidden, but when it can be avoided it is cruel, it is generally useless, and it ought to be forbidden unless there is reason to suspect that the houses are occupied by troops of the garrison, or are used as magazines." 2 Westlake, 78–79.

[62] H. R., 28. *Cf.* H. R., 47; B. D., 18; and 9 H. C. (1907), 7.

5. Spies and Espionage

383. **Spies.** — " A person can only be considered a spy if, acting clandestinely or on false pretenses, he obtains or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

" Thus, soldiers not in disguise who have penetrated into the zone of operations of the hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians, carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory (Art. 29)." [63]

" A spy taken in the act cannot be punished without previous trial (Art. 30)." [64]

" Much less may a garrison, as was at one time practiced, be put to the sword for an over obstinate defense." Holland, No. 83.

[63] H. R., 29. *Cf.* B. D., 19, 22. "To claim the benefit of the second clause of this article soldiers must be in uniform. Persons in balloons are not spies, even if engaged in observing the movements of the enemy. The examples given in this article are not intended to be exhaustive." Holland, No. 84.

Westlake (II, 80) observes that "the article leaves open the case of persons sent in balloons in order to gain information;" but he admits that the German treatment of spies (they were threatened with execution and actually imprisoned in fortresses) was unjustifiable. For the strange declaration of Admiral Alexieff, soon after the outbreak of the Russo-Japanese War, that war correspondents, who may communicate news to the enemy by means of wireless telegraphy, shall be regarded as spies, see Hershey, 115 ff.; Higgins, in 5 *Zeitschrift* (1912), 19 ff.; Lawrence, *War and Neutrality* (2nd ed.), 83 ff.; 1 Rey, 368 ff.; and Smith and Sibley, 82–85.

"The essence of spying is false pretences. To establish the quality of a spy in the case of a soldier, there must be disguise; in the case of the civilian spy, disguise is not essential — the clandestine nature of the act is sufficient condemnation." Spaight, 203.

"Guides are not spies. If they are captured and are soldiers, they become prisoners of war. If they are civilians, an invading army might find it necessary to detain them; but subjects of the country who are caught guiding an invading army without being compelled to do so are liable to punishment for treason." 2 Westlake, 80.

[64] H. R., 30. *Cf.* B. D., 20. The trial is by court martial, and the punishment generally death. Formerly spies were hanged; they are now usually shot. The severity of the punishment can hardly be justified, for it does not operate as an effective deterrent — the only ground upon which it is advocated. The motives of the spy are immaterial and the practice is not necessarily dishonorable.

"A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage (Art. 31)." [65]

6. NON-HOSTILE INTERCOURSE BETWEEN BELLIGERENTS

384. **Flags of Truce.** — "A person is considered as the bearer of a flag of truce who is authorized by one of the belligerents to enter into communications with the other, and who comes with a white flag. He has the right to inviolability, as have also the trumpeter, bugler or drummer, the flag bearer, and the interpreter who may accompany him (Art. 32)." [66]

"The Commander to whom a bearer of truce is sent is not obliged to receive him under all circumstances. He may take all steps necessary to prevent the bearer taking advantage of his mission to obtain information. In case of abuse, he has the right to detain the bearer temporarily (Art. 33)." [67]

"The bearer of a flag of truce loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery (Art. 34)." [68]

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[65] H. R., 31. *Cf.* B. D., 21. "Otherwise, he is not entitled to treatment as prisoner of war. He may, of course, have incurred responsibility for acts of a different kind." Holland, No. 87.

[66] H. R., 32. *Cf.* B. D., 43. All these persons enjoy the rights of inviolability, *i.e.* "they may not be subjected to personal injury or detained as prisoners. It goes without saying that the bearer of a flag of truce is entitled to this immunity if he comes without attendants." Lawrence (4th ed.), § 211. The immunity would probably also extend to his guide and any other necessary attendants not indicated in the text.

[67] H. R., 33. *Cf.* B. D., 44.

The Hague Conference of 1899 suppressed the following paragraph of the Brussels Declaration: "He (the Commander) may equally declare beforehand that he will not receive bearers of flags of truce during a certain period. Envoys presenting themselves after such a notification from the side to which it has been given, forfeit their right to inviolability." It would seem, therefore, that such a declaration on the part of a Commander is no longer permissible. This is not, however, the view laid down in the British and German manuals, which still permit the practice. See Holland, No. 90; and *Kriegsgebrauch*, 27, or Carpentier, 65. *Cf.* Spaight, 223.

The circumstances which excuse a Commander from receiving a bearer of a flag of truce are dictated by considerations of military necessity, as, *e.g.* in the midst of an assault or a pursuit, or during the execution of a secret movement.

In order to prevent the envoy from obtaining information, he is usually blindfolded while passing through the army or camp of the enemy. This is not regarded as in anywise humiliating. It is the duty of the Commander to take this or any other precautions which may be deemed necessary or advisable.

385. **Capitulations.** — "Capitulations agreed upon between the Contracting Parties must be in accordance with the rules of military honor. Once settled, they must be scrupulously observed by both parties (Art. 35)." [69]

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[68] H. R., 34. *Cf.* B. D., 45.

"If he purchases plans, or incites soldiers to desertion, or attempts to sketch defenses, he may be deprived of liberty, or perhaps, in extreme cases, executed as a spy." Lawrence (4th ed.), § 211. But it is only in the extremest cases that he may be so treated. If he gains important knowledge inadvertently or through the mere passive use of his senses, he is only subject to honorable and temporary detention. He is in honor bound not to seek information by illegitimate means, but he is under no obligation to refrain from reporting what he has seen and heard to his Commander. Spaight, 218–220.

For examples of the abuse of the white flag, see *Ibid.*, 224–225. See especially the translation of the Japanese Instructions from Ariga (pp. 273–274) on pp. 226–227.

The *Hague Regulations* are silent as to *Cartels*, *Passports*, *Safe-conducts* and *Safeguards*, which are usually discussed in this connection.

Cartels are agreements between belligerents concluded for the purpose of regulating certain kinds of non-hostile intercourse, more especially the exchange of prisoners, the reception of flags of truce, and intercommunication by means of postal, telegraph, telephone, or railway facilities.

Passports, or *Safe-conducts*, are written permissions granted by a belligerent Commander to one or more enemy subjects to travel within the territory under his control. The terms seem to be convertible, though safe-conducts are sometimes held to apply only to a particular district or locality and to be issued for a particular purpose. The term "safe-conduct" is also applicable to the carriage of goods to a particular place. They are non-transferable and are revocable on grounds of military expediency. "It must, however, be specially observed that passports and safe-conducts are only a matter of International Law when their grant has been arranged between the belligerents or their respective commanders. If they are granted without such an arrangement unilaterally on the part of one of the belligerents, they fall outside the scope of International Law." 2 Oppenheim, § 218. This is also the case with *Safeguards*.

A *Safeguard* is a "notification by a belligerent Commander that buildings or other property upon which the notification is usually posted up, are exempt from interference on the part of his troops. The term is also used to describe a guard, placed by a Commander to insure such exemption. 'Forcing a safeguard' is a serious offence." Holland, No. 101. "The object of a safeguard is generally to protect museums, historic monuments or the like; occasionally to show respect for a distinguished enemy, as in the case of the safeguard which McClellan placed over Mrs. R. E. Lee's residence, White House, Virginia, in 1862." Spaight, 231.

"Soldiers employed as a safeguard are guaranteed against the application of the laws of war, and if the enemy occupies the locality it is usual to send them back to the army to which they belong; and in such a case their arms and baggage accompany them." *Ibid.*, cited from Pillet, 560; and Bonfils, No. 1247.

[69] H. R., 35. *Cf.* B. D., 46. "A capitulation is an agreement for the surrender of troops or places. A capitulation clearly in excess of the implied authority of the

386. **Armistices.** — "An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice (Art. 36)."[70]

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officer by whom it is made, when it is technically described as a mere '*sponsion*,' as, for instance, that his troops shall never serve again against the same enemy, may be repudiated by his Government.

"It is an implied condition, in the capitulation of a place, that the capitulating force shall not destory its fortifications or stores, *after* the conclusion of the agreement." Holland, No. 92.

The terms set forth in an agreement to capitulate may vary from absolute unconditional surrender to the grant of "all the honors of war," *i.e.* the right to depart armed with drums beating and colors flying. Usually troops which have surrendered become prisoners of war, and, unless otherwise agreed upon, a capitulating garrison must also be considered prisoners. "Usually, however, as an act of grace, the officers and functionaries of similar standing are allowed to return to their homes on giving their *parole d'honneur* and there are a few instances of the same privilege being extended to the rank and file." Spaight, 255.

"The war *material* and public properties and moneys of a fortress or force which has capitulated pass to the conqueror. Private property, except arms, horses, and military papers, are free from appropriation under Article IV of the *Reglement* (H. R., 4). Usually, officers are allowed to retain their swords, and when the capitulation is 'with the honors of war,' the men keep their arms as well." *Ibid.*

Stipulations or agreements in excess of powers are null and void. They are called *sponsions*. Such were the political provisions contained in the Capitulation agreed to by Generals Sherman and Johnston in 1865 to the effect that several State Governments were to be recognized, and that the people of the Confederacy were to be guaranteed their political rights and franchises as citizens of the Union. 5 Rhodes, *History of the U. S.*, 166.

"Stipulations affecting the political constitution or administration of a country or place, or making engagements with respect to its future independence, cannot be consented to even by an officer commanding in chief without the possession of special powers; and a subordinate commander cannot grant terms without reference to superior authority, under which the enemy gains any advantage more solid than permission to surrender with forms of honor." Hall (6th ed.), 547-548. Cited, with approval, by 2 Westlake, 81.

[70] H. R., 36. *Cf.* B. D., 47. "There is no difference of meaning, according to British usage, at least, between a 'truce,' an 'armistice,' and a 'suspension of arms.'" Holland, No. 93.

This statement is correct, at least from a legal standpoint, for the same rules apply in each case. It is customary, however, to distinguish between "armistices" or "truces" in the wider sense of these terms and a mere "suspension of arms," though these terms are often used interchangeably in practice.

"Agreements for the temporary cessation of hostilities are called suspensions of arms when they are made for a passing and merely military end and take effect for a short time or within a limited space; and they are called truces or armistices when they are concluded for a longer term especially if they extend to the whole or a con-

"An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second, only those between certain fractions of the belligerent armies and within a fixed radius (Art. 37)." [71]

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siderable portion of the forces of the belligerents, or have an entirely or partially political object." Hall (6th ed.), 540. Hall adds in a note, "It is hardly possible to draw a clear line of distinction between suspensions of arms, truces, and armistices, though in their more marked forms they are readily to be distinguished." *Cf.* Lawrence (4th ed.), § 216. Oppenheim (II, §§ 231 ff.) distinguishes between (1) suspensions of arms, (2) generally armistices, and (3) partial armistices.

An armistice is usually, though not necessarily, a precursor of peace. It need not apply to all the forces in the field of military operations, but whether general or partial, armistices or truces have nearly always an important political as well as military purpose. Mere suspensions of arms are generally concluded for such military purposes as collection of the wounded and burial of the dead; negotiations for surrender or capitulation; and the need for instructions from superior authority.

In order to avoid misunderstanding and recrimination, it is very important to fix upon a definite date (including the precise hour) for the beginning and ending of an armistice.

[71] H. R., 37. *Cf.* B. D., 48. By "local" armistices are probably meant suspensions of arms and partial armistices. "Every Commander has the power to conclude a special, partial, or local armistice with respect to the forces and places under his immediate control, but a general armistice covering the whole field of hostilities can be made only by the Commander in chief or diplomatic representatives, and requires ratification by the supreme power in the State. At the end of the Russo-Japanese War, in 1905, the general armistice which preceded the peace was drawn up and signed by the plenipotentiaries engaged in negotiating the main treaty. After laying down a few principles of universal application, they provided for special armistices for the various parts of the theater of war." Lawrence (4th ed.), § 216. *Cf.* Ariga, 548–562; and Takahashi, 219–224.

"An armistice should specify, as far as possible, the acts which are forbidden, and those which are permitted, to the belligerents during its continuance." Holland, No. 94.

The question of what is permissible during an armistice is much controverted. There is general agreement that all actual hostilities should cease, but that the belligerents may continue their preparations for offense and defense outside the "line where the forces face each other. . . . The majority of writers, led by Vattel (III, § 245), maintain that in absence of special stipulations it is essentially implied in an armistice that within such line no alteration of the *status quo* shall take place which the other party, were it not for the armistice, could by application of force . . . prevent from taking place. . . . On the other hand, a small (?) minority of writers, but led by Grotius (III, c. 21, § 7) and Pufendorf (VIII, § 7), assert that cessation of hostilities and of further advance only are essentially implied in an armistice, all other acts such as strengthening of positions by concentration of more troops on the spot, erection and strengthening of defenses, repairing of breaches of beseiged fortresses, withdrawing of troops, making of fresh batteries on the part of besiegers without advancing, and the like being allowed." 2 Oppenheim, § 237. *Cf.* Bonfils (Fauchille), Nos. 1254–1256; Despagnet, No. 564; Hall (6th ed.), 541; Lawrence (4th ed.), § 216; and Spaight, 235–239.

"An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed (Art. 38)." [72]

"It rests with the Contracting Parties to settle, in the clauses of the armistice, what relation may be held, within the theater of war, *with and between the populations* (*avec les populations et entre elles*) (Art. 39)." [73]

The latter or minority view is supported by such authorities as Bonfils, Despagnet, Lawrence, Oppenheim, Pillet, and Spaight, and is more in accord with modern practice. To permit what is not expressly prohibited is, as Spaight (p. 238) observes, "the only safe and satisfactory rule." In his fourth edition, Lawrence (§ 216) abandons the view expressed in former editions (§ 237) that "during an armistice a belligerent may do in the actual theater of war only such things as the enemy could not have prevented him from doing at the moment when active hostilities ceased." He now declares the "weight of authority" to be in favor of this view, but the "weight of reasoning" and "recent practice" to be on the side of the principle that the belligerent "may do whatever is not forbidden expressly, except, of course, attack the enemy or advance further into his territory." It is strange that Westlake (I, 82) still adheres to the older doctrine as laid down by Hall (6th ed.), 541.

"There is also a controversy respecting revictualling of a besieged place during an armistice. During the Franco-German War of 1870, Thiers claimed that military usage permitted the revictualling of Paris on the ground that, "at the end of the armistice, each belligerent ought to find himself in the same situation as at the beginning." But the claim was denied by Bismarck "unless for some military equivalent." Spaight, 242. The question is one of those which should be specifically dealt with in the armistice. On the revictualling of a besieged place, see especially Hall, 566–567; and 7 P.-Fodéré, No. 2908.

[72] H. R., 38. *Cf.* B. D., 49. Each belligerent must notify his own troops. He is not bound to accept the notification from the enemy, "which may be a Greek gift." Spaight, 240. "Sometimes varying times are fixed for the commencement of the armistice, to allow of distant or isolated forces being notified without delaying the effect of the suspension in nearer places, and to prevent complications arising through such forces continuing hostilities should the armistice take effect from the date of signature. Hostilities cease from the moment of signing unless a later date is specified in the agreement. They need not cease during negotiations for an armistice; the negotiations must not be made the cover for a treacherous attack, but a belligerent is not bound to discontinue his operations because an armistice is being discussed. . . . Once the armistice is signed, if it is not to commence at a later date, any acts of war done in ignorance of it are null and void, and should be rectified as far as possible." *Ibid.*, 243–244.

In order to prevent hostilities during an armistice, it is customary to agree upon so-called lines of demarkation or a place of neutral ground between the opposing armies which must not be entered by the soldiers of either army. For examples, see Spaight, 244–245.

[73] H. R., 39. *Cf.* B. D., 50. Of the various translations consulted, Spaight's (p. 232) rendering of the phrase set in *italics* appears to be the only correct one.

"Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities immediately (Art. 40)."[74]

"A violation of the terms of the armistice by individuals acting on their own initiative, only gives the right of demanding the punishment of the offenders, and, if necessary, an indemnity for the losses sustained (Art. 41)."[75]

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Nearly all the other versions translate the phrase *avec les populations et entre elles*, "with the populations and with each other." This is certainly both incorrect and misleading. "Of course, what is intended to be regulated is the intercourse of the population of the *occupied* territory with the population of the country still held by the enemy (in both cases nationals of the enemy State); and also between each belligerent force and the inhabitants of the localities held by the other." Spaight, 233 n.

"Article 39 lays down that the parties must settle what relations are to exist with and between the populations during an armistice. This provision is rendered necessary by the principle that an armistice suspends fighting but does not affect the state of war. . . . In the absence of a special provision, the invading belligerent's war rights as against the population continue unchanged. He can raise requisitions, billet his soldiers, demand services in kind and levy contributions, and his general martial law regulations remain in full force. And war conditions still hold good as regards the mutual relations of the inhabitants of the districts held by the two belligerents. In the absence of special conditions in the Protocol, the conclusion of the armistice does not free the inhabitants of the occupied territory from the obligation of holding no intercourse with the people in the other belligerent's zone of authority. They may be treated as spies or war traitors if they offend just as if hostilities continued." *Ibid.*, 245–246.

[74] H. R., 40. *Cf.* B. D., 51. As Oppenheim (II, § 239) points out: "Three rules may be formulated out of this — (1) violations which are not serious do not even give the right to denounce an armistice; (2) serious violations do regularly empower the other party to denounce only the armistice, but not to take up at once hostilities without notice; (3) only in case of emergency is a party justified in recommencing hostilities without notice, when the other party has broken an armistice. But since the terms 'serious violation' and 'urgency' lack a precise definition it is practically left to the discretion of the injured party."

[75] H. R., 41. *Cf.* B. D., 52. It should be added that "a treaty of peace, after signature, but before ratification, operates as a general armistice." Holland, No. 99.

* Higgins, 240–245, 279–280; * Holland, 48–52; * *Kriegsgebrauch*, 26–29; Lawrence (4th ed.), Pt. III, ch. 7; * Longuet, §§ 134–154; Lueder, in 4 Holtzendorff, 525–544; 3 F. de Martens, § 127; * Mérignhac, Nos. 107–117; * 7 Moore, *Digest*, §§ 1157–1162; * 2 Oppenheim, §§ 215–240; 3 Phillimore, §§ 97–126; 2 Piédelièvre, Nos. 953–969; * Pillet, Nos. 233–245 and pp. 472–476; 7 P.-Fodéré, Nos. 2882–2938; 2 Rivier, 360–368; * Spaight, chs. 7–9; Takahashi, Pt. II, chs. 7–8; Taylor, §§ 508–516; Ullmann (2nd ed.), §§ 185–186; Vattel, liv. III, §§ 233–277; 2 Westlake, 81–83; Wilson, §§ 152–159; * Zorn, *Das Kriegsrecht zur Lande* (1906), 195–206.

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CHAPTER XXVI

WAR ON LAND (*Continued*)

THE LAW OF MILITARY OCCUPATION

387. **Occupation Defined.** — "Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established and can be exercised (Art. 42)." [1]

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[1] H. R., 42. *Cf.* B. D., 1. Like blockade at sea, occupation "in order to be binding must be effective," *i.e.* real and actually capable of enforcement. A mere proclamation or "paper" occupation will not suffice, though a formal notification may be taken as evidence of occupation.

"War law distinguishes between the invasion and the occupation of a hostile territory. . . . Invasion ripens into occupation when the national troops have been completely ousted from the invaded territory and the enemy has acquired control over it. . . . War law recognizes in the occupying belligerent a right of government which comes very near to the right of sovereignty." Spaight, 321.

Belligerent or military occupation should also be distinguished from conquest. *Cf. supra*, § 171. The rights of a military occupant, however absolute, are in no wise those of a sovereign. They are merely provisional and are based upon military necessity. The occupant may not exact an oath of allegiance and his status is not even that of a temporary or substituted sovereign. The theory of the "temporary allegiance of the inhabitants" as laid down by some authorities (*e.g.* by Birkhimer, in *Military Government and Martial Law*, 2d ed., 1904) and our courts, is, therefore, erroneous.

Prior to the middle of the eighteenth century there was no distinction, either in theory or practice, between a mere occupation and a completed conquest. It was first made by Vattel (liv. III, § 197), but the full consequences of this distinction were not drawn before the appearance of Heffter's (§ 131) remarkable work in 1844.

On the older theory and practice, see especially: Hall (6th ed.), 458 ff.; Lawrence (4th ed.), § 176; 2 Oppenheim, § 166; and 2 Westlake, 85. The special student of this subject will find much illustrative material in the works of Lameire (see Bibliography at the close of this chapter).

There has been much controversy over the question as to what constitutes real or effective military occupation. It is now agreed that mere invasion is not occupation, and that constructive or presumptive occupation is insufficient. At the Brussels Conference of 1874, the smaller Powers stood up for the rights of the native

388. **The Authority of the Occupant.** — "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reëstablish and insure, as far as possible, public order and safety (*l'ordre et la vie publics*) while respecting, unless absolutely prevented, the laws in force in the country (Art. 43)." [2]

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inhabitants of an occupied district; the larger Powers (particularly Germany) championed the rights of the military occupant. The result was a compromise which is mainly in favor of the view of the smaller Powers and which certainly condemns some of the methods employed by the Germans during the Franco-German War of 1870. For a summary of the German theory and practice, see Spaight, 326–327.

Westlake, (II, 84) agrees with Hall (6th ed., 480) that "a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot; or so long as it covers it, unless the operations of the national or an allied army, or local insurrection have reëstablished the public exercise of the legitimate sovereign authority." This is probably as good a statement of the law as can be found.

"But it would be unwise to interpret occupation too stringently as against the rights of the occupant. There is occupation so long as the occupant does actually exercise authority, to the exclusion of the legal government, in the area in question; and this he may do by means of flying columns quite as well as by maintaining garrisons. He must *police* the country and have it firmly under control. To establish an effective blockade there need not be a line of cruisers drawn across the mouth of a harbor, but there must be some force within striking distance, so as to make it difficult for any vessel to 'run the blockade' and gain entrance; and the same principle governs occupation. The whole population need not necessarily have been disarmed, nor is it essential that the occupation shall have been made known by proclamations. . . ." Spaight, 328.

[2] H. R., 43. *Cf.* B. D., 2–3. "The word 'safety' does not adequately render the *vie public* of the original, which describes the social and commercial life of the country." 2 Westlake, 84.

H. R., 43 "indicates that the law to be enforced by the occupant consists, first, of the territorial law in general, . . . and, secondly, of such variations of the territorial law as may be required by real necessity and are not expressly prohibited by any of the further rules which will come before us. Such variations will naturally be greatest in what concerns the relations of the communities and individuals within the district to the invading army and its followers. . . . Indeed, the entire relation between the invaders and the invaded, so far as it may fall within the criminal department whether by the intrinsic nature of the acts done or in consequence of the regulations made by the invaders, may be considered as taken out of the territorial law and referred to what is called martial law." 2 Westlake, 86.

"Martial law consists of such rules as are adopted, at his own discretion, by a Commander in chief in the field, supplementing, or wholly or partially superseding the laws ordinarily in force in a given district. . . .

"'Martial law,' as thus defined, must be carefully distinguished from 'military law,' *i.e.* for the British Army, that fixed body of rules, now contained in the Army Act of 1881, as continued in force by the Army (Annual) Act, which is applicable in peace or in war, at home or abroad, to 'all persons subject to military law,' and to such persons only.

389. **Illegitimate Information.** — " A belligerent is forbidden to force the population of occupied territory to *give information about the army of the other belligerent, or about his means of defense* (Art. 44)." [3]

"In exercising his discretion in the administration of martial law, a commander should always be guided by the laws and customs of war, as generally accepted.

"Punishment under martial law should, as far as possible, be inflicted only after inquiry by a military court, convened for the purpose.

"Martial law applies to all persons, and to all property, within the district in which it is in force, irrespectively of the nationality of such persons, except in the case of diplomatic agents accredited by neutral States to the territorial sovereign." Holland, *War*, etc., Nos. 4–7, 9. See also Nos. 8, 10–15. *Cf.* the articles cited from the *American Instructions*, in 7 Moore, *Digest*, § 1147.

It should also be noted that martial law is sometimes proclaimed and administered by the lawful sovereign in the face of invasion by a foreign foe or in times of riot or insurrection. But the distinction between "martial" and "military" law made by Birkhimer (Introduction and ch. 17) as applied to enemy and domestic territory respectively is not in accordance with usage. The terms are often used interchangeably, though military law is, properly speaking, the law for the government of the military forces themselves, whereas martial law is the law in accordance with which military authority is exercised in an occupied district. Both may exist in time of peace as well as war. On Military and Martial Law in the United States, see especially 2 Willoughby, *Const. Law of the U. S.*, chs. 61 and 62.

For examples of proclamations of martial law, see Spaight, 336–346. See especially the order of President McKinley, cited in 7 Moore, § 1143, pp. 261–263.

"The practice of modern wars has been to leave existing laws in force, unless they are quite irreconcilable with a state of occupation, as recruiting laws are." Spaight, 356. This is held to apply particularly to civil and penal laws. "It may be necessary to vary the criminal, administrative, and other branches of Public Law, but hardly to interfere with the rules of Private Law, *e.g.* as to property, contracts, or family relations." Holland, No. 103.

In so far as the occupant does not exceed his powers, his acts are legally valid, and cannot be nullified by the succeeding Government. This is particularly true of judicial decisions (excepting sentences for "war treason") and of administrative acts which are not of a political nature or which do not operate beyond the period of occupation. "When the occupation comes to an end, . . . no redress can be had for what has been actually carried out, but nothing further can follow from the occupant's legislation." 2 Westlake, 87. See *Ibid.*, p. 88 for an exception.

"The occupant will often be glad to avail himself of the services of the native local authorities, so far as he can trust them, in case, and so long as, they are willing to continue in office." Holland, No. 103. Such has been the practice during recent wars and it is a usage which is obviously to the interest of both parties, but it is not obligatory. It applies especially to ordinary or local civil, financial, judicial, and police functionaries, not to important *political* officials. See especially: Bonfils, Nos. 1164–1175; Bordwell, 307–310; and Spaight, 357–366. For fuller details, see Bray, *De l'occupation militaire* (1894), 178 ff.

[3] H. R., 44. *Cf.* B. D., 36. This virtually new article was added in 1907. The old Article 44 (1899) was transferred to H. R., 23 h. *Cf. supra*, p. 395. Holland (No. 104) still considers it doubtful whether even this additional arti-

390. **Oath of Allegiance.** — "It is forbidden to compel the population of occupied territory to take an oath [of allegiance] to the hostile Power (Art. 45)." [4]

391. **Family Honor, etc. Respect for Private Property.** — "Family honor and rights, the lives of individuals and private property, as also religious convictions and freedom of worship, must be respected.

"Private property cannot be confiscated (Art. 46)." [5]

392. **Pillage Forbidden.** — "Pillage is formally forbidden." [6]

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cle forbids the use of "forced guides," but in this he is surely mistaken. *Cf.* Higgins, 269; and Spaight, 368 ff.

It should, however, be pointed out that in signing the Convention, Germany, Austria-Hungary, Japan, and Russia made reservations on the subject of this article. But these Powers are bound by H. R., 23 h, which prohibits a belligerent to "compel the nationals of the hostile party to take part in operations of war directed against the enemy."

[4] H. R., 45. *Cf.* B. D., 37. An *oath of neutrality* has, however, sometimes been required. For an example during the Anglo-Boer War, see Spaight, 372. Some publicists (*e.g.* Bordwell, 309) are of the opinion that an oath of fidelity may be required of officials.

"War crimes," whether committed by soldiers or by private individuals, may be severely punished. For lists of such offenses, see 2 Oppenheim, §§ 253, 255. The term "war treason" in this connection is objectionable. See 2 Westlake, 90. For a defense of the term, see Spaight, 333 ff. The term "war insurgent" would be preferable.

[5] H. R., 46. *Cf.* B. D., 38. This has been called the "Magna Charta of War Law." Spaight, 374. But the article must unfortunately be read "subject to military necessities."

"The freedom of worship secured by this article is obviously liable to restriction if it be used for the purpose of seditious propaganda or the encouragement of opposition to the occupant's Government." Spaight, 375.

"By the prohibition of confiscation it is only meant that private property cannot by any regulation of the invader be taken from its owner for no other reason than that he is an enemy, not that it cannot be taken for military necessity or by way of punishment for disobedience to a regulation or requisition." 2 Westlake, 92–93.

Though the practice of taking the hostages from an occupied district (as, *e.g.* to insure the prompt payment of contributions and requisitions or as a guarantee against insurrection) does not appear to be wholly obsolete, persons detained as hostages cannot be put to death. The conduct of the Germans during the Franco-German War in placing notable civilians upon the engines of railway trains carrying German troops has been almost universally condemned.

[6] H. R., 47. *Cf.* B. D., 39, and H. R., 28.

"Pillage, or loot, was defined by General de Leer, at the Brussels Conference of 1874, as 'booty which is not permitted'; and Baron Jomini explained that 'there is a booty which is permissible on the field of battle — horses, etc. It is booty acquired at the expense of private property that the Commission means to prohibit.'" Holland, No. 107.

393. **Taxes.** — "If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as possible, in accordance with the rules of assessment and incidence in force, and he shall in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that to which the legitimate Government was bound (Art. 48)." [7]

394. **Contributions.** — "If, besides the taxes referred to in the preceding Article, the occupant levies other money contributions in the occupied territory, this can only be for the needs of the army or of the administration of such territory (Art. 49)." [8]

"No general penalty, pecuniary or otherwise, can be inflicted

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"As a term of modern law, it (pillage) may be defined as the unauthorized taking away of property, public or private, so that in order to appreciate the prohibition contained in this article we must know what taking away is authorized." 2 Westlake, 93. For this information, see *infra*, §§ 394 ff.

[7] H. R., 48. *Cf.* B. D., 5. "The wording of this article was slightly altered from that of Bv. in order not to seem to give the occupant a right to collect the taxes." 2 Westlake, 94.

"The words 'imposed for the benefit of the State' are intended to exclude provincial and parochial taxes, or 'rates,' as they are called in England. The latter the occupant must not intercept; he can only supervise the expenditure of such revenue, to see that it is not devoted to a hostile purpose.

"The first charge upon the State revenue collected by the occupant is the cost of the local administration. When this has been provided for, any surplus that remains . . . may be devoted to the purposes of the occupant. . . . No new taxes should be imposed by the occupant, for the imposition of taxation is, in modern times, an attribute of sovereignty. . . . But if the occupant cannot create taxes, he may levy contributions and requisitions, which serve the same end." Spaight, 378–379.

"As there would seldom be a law binding the legitimate Government to any scale of expense, the scale existing at the date of invasion would probably be understood as meant." 2 Westlake, 94.

[8] H. R., 49. *Cf.* B. D., 40 and 41. Contributions are not to be levied by way of securing riches or indemnity or for the purpose of inducing a stubborn enemy to submit. Even the official publication of the German General Chief of Staff (*Kriegsgebrauch im Landkriege*, 63) only permits money contributions in the following cases:

(1) In place of taxes; (2) instead of requisitions in kind; (3) by way of penalty.

The exaction of money contributions has been defended on the ground that they sometimes make possible a more equitable distribution of military burdens than requisitions or contributions in kind. "It may sometimes be justifiable to levy a money contribution on one place, in order to spend it on the purchase of requisitions in another place. The burden of the war may thus be more equitably distributed, falling on the inhabitants generally, rather than upon individual owners of property which may be required." Holland, No. 109. *Cf.* Spaight, 387.

on the population on account of individual acts for which it cannot be considered as collectively responsible (Art. 50)."[9]

"No contribution shall be collected except under a written order, and on the responsibility of a Commander in Chief.

"This collection shall only take place, as far as possible, in accordance with the rules in force for the assessment and incidence of taxes.

"For every contribution a receipt shall be given to the contributors (Art. 51)."[10]

395. **Requisitions.** — "Neither requisitions in kind nor services can be demanded from communities (*communes*) or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of

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[9] H. R., 50. The usual mode of collective punishment is that of fines. "Of all the punishments used by war law, fines are the commonest and in many ways the most satisfactory and humane. They are, says the German *Kriegsgebrauch im Landkriege* (p. 63), the most effective way of bringing a civil population to book. But they are a form of punishment which needs to be used with the greatest discretion and care. Bluntschli admits that the Germans stretched their war right of collective punishment altogether beyond its proper limit in 1870–1871. A system of collective responsibility was established, which made not only the *commune* in which an offense was committed, but also that from which the delinquent came, liable for the offenses. It is this practice which the Hague Article aims at prohibiting; its intention is to confine collective punishment to such offenses as the community has either committed or has allowed to be committed. Two important reservations to this general statement must, however, be made. First, the act punished need not necessarily be a violation of the laws and customs of war. . . . Any breach of the occupant's proclamations or martial law regulations may be punished in this way. Secondly, the provision of Article L does not prejudge the question of reprisals. Consequently, collective punishment may be inflicted in such circumstances as warrant the infliction of reprisals. There is nothing unfair in holding a town or village collectively responsible for damages done to railways, telegraphs, roads and bridges in the vicinity; it is the practice in all wars." Spaight, 408. See *Ibid.*, pp. 409–410 for examples. *Cf.* Bonfils, No. 1218; Bordwell, 316–317; Lawrence (4th ed.), 447–449; and 2 Westlake, 95–96.

[10] H. R., 51. *Cf.* B. D., 41. "The receipt mentioned in this article is intended as evidence that money, goods, or services have been exacted, but implies, in itself, no promise to pay on the part of the occupant. He does not even thereby bind his Government, if victorious, to stipulate in the Treaty of Peace that the receipts shall be honored by the Government of the territory which has been under occupation. A Swiss proposal, making it obligatory to honor the receipts mentioned in this and the following article, was indeed deliberately rejected at the first Hague Conference.

"An occupant may, of course, incur a greater liability by the form which he chooses to give to his receipts, or under the terms of a general proclamation which he has issued." Holland, No. 111. *Cf.* Bordwell, 107 and 318.

such a nature as not to imply for the population any obligation to take part in military operations against their country.

"These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

"Supplies in kind shall, as far as possible, be paid for in cash; if not, their receipt shall be acknowledged, *and the payment of the sums due shall be made as soon as possible* (Art. 52)." [11]

396. **Appropriation of Movable State Property.** — "An army of occupation can only take possession of cash, funds, and realiz-

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[11] H. R., 52. *Cf.* B. D., 42. The ambiguous phrase set in italics was added in 1907. "The implication intended by those who would free the individual as far as possible from the burden of the war probably is that the amount is due from the belligerent giving the receipt, but the fact that the provision is not worded more definitely than it is shows that the Governments were unwilling to agree to any absolute obligation in this regard and it is likely that whether the amounts indicated in these receipts are paid or not will be left to the Treaty of Peace or the action of the country in which the receiver was domiciled, as in the case of receipts given for war contributions." Bordwell, 319.

The original wording of this additional provision of H. R., 52 (1907) urged the payment of the receipts "as soon as possible, *even before the close of hostilities* so far as the military authority of the belligerent shall have the necessary pecuniary means in its power." 2 Westlake, 270. *Cf.* Higgins, 270; and Lémonon, 371. Westlake adds: "This addition leaves the matter much as it stood before. No obligation of the invading government to furnish its military authority with the means of satisfying the receipts is expressed. . . ."

But Spaight (p. 384) expresses a somewhat different view: "The last Hague Conference, in making the requisitioning belligerent responsible for payment, has struck a blow at the right of requisitioning — the extreme right recognized by jurists — which may change its whole nature, and complete a process which has already begun, of replacing requisitioning by the system of amicable purchase or at least by a right of preëmption. . . . The process is far from complete. As war law stands to-day, contributions and requisitions remain as approved methods by which an invader can procure from the enemy's citizens such funds, goods, or services as his army needs — subject, in the case of requisitions, to his paying therefor either at the time or subsequently." *Cf. Ibid.*, 389 ff.

Supplies of any kind actually *needed by the army of occupation* are liable to requisition. They are usually collected through the medium of the local civil authorities. It should be strongly emphasized that they must not exceed the needs of the army or the resources of the country. In any case the native population should not be deprived of all means of subsistence and recovery.

"'Requisitions in kind' may, of course, relate not only to provisions, but also to horses, vehicles, clothing etc. The 'services' here intended are such as would be rendered by drivers, blacksmiths, and artisans and laborers of all kinds; as also by the occupiers of houses upon which troops are quartered." Holland, No. 112.

The "services" demanded must not be of such a nature as require participation in military operations. Holland (*op. cit.*) is of the opinion that "the 'operations of war' here intended would probably not comprise works at a distance from the scene of hostilities," but this is "probably" a mistaken view.

able securities (*valeurs exigibles*) which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property of the State which is of a nature to be used for military operations.

"*All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or things* (aside from cases governed by maritime law), depôts of arms, and, generally, all kinds of war material may be seized, even though they belong to private persons, but they must be restored and compensation arranged for at the peace (Art. 53)."[12]

397. **Submarine Cables.** — "*Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in case of absolute necessity. They must likewise be restored and compensation arranged for at the peace* (Art. 54)."[13]

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[12] H. R., 53. *Cf.* B. D., 6. "It may be noted that considerable differences of opinion exist to the meaning of the purposely ambiguous term 'valeurs exigibles,' here translated 'realizable securities.' It has been officially translated into German by 'eintreibarre Forderungen.'" Holland, No. 113.

"All writers admit the occupants' right to appropriate and realize documents 'payable to bearer'; the difficulty is as to 'monies due' upon bills or checks requiring indorsement, or upon contract debts in any other form." Spaight, 411. The preponderant opinion at present seems to be that, while the occupant may appropriate *matured* debts, as also the interest on debts due the enemy State, he has no legal right to enforce the payment of debts which are not matured, or to indorse a check payable to order. See especially: Bonfils, Nos. 1191–1193; Despagnet, No. 602; Mérignhac, No. 149; Pillet, Nos. 170–171; Spaight, 411–412; and 2 Westlake, 103–104.

Among the *appliances*, etc., referred to in the second paragraph of H. R., 53 (1907), as liable to sequestration even though belonging to private persons, B. D., 6 (1874) had specifically named "railway plant, land telegraphs, steamers, and other ships." H. R., 53 (1899), added "telephones." In 1907 it was deemed best to proceed by way of general formula rather than specific enumeration.

It should be particularly noted that movable State property is liable to seizure and permanent appropriation, whereas private property (of the sort referred to in the second paragraph of the text), if seized, must be restored and compensation made to the owners at the conclusion of peace. This would seem to imply that receipts must be given.

It should be added that "some forms of property, nominally belonging to the State, *e.g.* the funds of saving banks, may be in reality private property, under State management." Holland, No. 113. Any fund of which the State is mere custodian or trustee, such as State insurance or pension funds, would also be exempt.

[13] H. R., 54 (1901). This wholly new article takes the place of H. R., 54 (1899), which dealt with railway material coming from neutral States and which now forms part of 5 H. C., 19. See *infra*, § 456.

"There is general agreement that cables connecting neutral territory are inviolable, that cables connecting enemy territory may be cut anywhere except in neutral

398. **Immovable State Property.** — "The occupying State shall regard itself only as administrator and usufructuary of the public buildings, immovable property, forests, and agricultural undertakings belonging to the hostile State and situated in the occupied country. It must protect the capital of these properties, and administer them according to the rules of usufruct (Art. 55)."[14]

399. **Churches, Schools, Works of Art, etc.** — "The property of communities (*communes*), that of institutions devoted to

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waters, and that under this Article, in case of necessity, cables connecting an occupied territory may be cut within such territory." Higgins, 271–272. *Cf.* Art. 5 of Stockton's *Naval War Code* (1902); The *Rules of the Institute of Int. Law on Submarine Cables* (1902); Hershey, *The Russo-Japanese War*, 122; and 2 Westlake, 280.

It has been a controverted question whether it is permissible for a belligerent to cut a cable connecting neutral with belligerent territory in the open sea. In 1902 the Institute of Int. Law (see 19 *Annuaire*, 331) laid it down that on the high sea such a cable "can only be cut if there is an effective blockade, and [then only] within the limits of the line of blockade, subject to the restoration of the cable with the briefest possible delay."

This rule is criticized by Westlake (II, 281–283) as resting on compromise rather than principle, but the same criticism might be applied to many existing rules or usages of International Law.

The United States refused compensation to Great Britain as a matter of legal obligation for damages caused by the cutting of a British cable at Manila in 1898, but Chile recognized the duty of payment for a similar act in 1883. 2 Westlake, 283 n. The precedent set by Chile is the better one.

Reasoning from the analogy of H. R., 54, it would seem permissible to cut such a cable, subject to the duty of compensation, provided it is absolutely necessary from a military standpoint.

For references on *Submarine Cables*, see Bibliography at the end of this chapter.

[14] H. R., 55. *Cf.* B. D., 7. "A person is said, in Continental systems of law, to be a 'usufructuary,' or to enjoy a 'usufruct,' in property in which he has an interest of a special kind, for life or some lesser period. The 'rule of usufruct' may be shortly stated to be that the property subject to the right must be so used that its substance sustains no injury." Holland, No. 115.

"There is no doubt that the occupant is entitled to get in the rents and dues of public immovables maturing during the occupation, and that his receipt for them will be a good discharge as against the enemy State. . . .

"In the case of forests, the right of a usufructuary is to cut the trees which regularly come to cutting during his tenancy; and this right the occupant has, subject to the condition that those who buy the timber from him must remove it during the continuance of the occupation, for the restored Government would not be bound to allow its removal. And if the occupant sells timber which has not regularly come to cutting, the courts of the legitimate Government will give no effect to any claims founded on such an illegal transaction." 2 Westlake, 106.

For the important case of the 15,000 oaks in the French State forests, sold by the Germans in 1870, see Latifi, *Effects of War on Property*, 19; Snow, *Cases*, 377; and Spaight, 367. The original citation is 2 Dalloz (1872), 229.

religious worship, charity and education, the arts and sciences, even when belonging to the State, shall be treated as private property.

" All seizure, destruction, or intentional injury of such institutions, of historical monuments, or of works of art and science is forbidden and should be prosecuted (Art. 56)." [15]

400. **Sanction of the Hague Regulations.** — " *A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be held liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*" [16]

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[15] H. R., 56. *Cf.* B. D., 8. "Roughly, one may give the gist of the Article as this: First, a Commander may, if necessary, turn a church into a hospital, but he may not auction the vestments or other church property to raise money. Secondly, he must not carry off or damage that class of property which may be generically described as 'starred by Baedecker.'" Spaight, 416.

[16] 4 H. C., 1907, Art. 3. According to Art 1 of the Hague Convention concerning the Laws and Customs of War on Land (4 H. C., 1899 and 1907), the Contracting Parties agreed "to issue to their armed land forces" instructions in conformity with the Hague Regulations. The provisions contained in these Regulations as also those in the Hague Convention are declared binding only between the Contracting Parties, and then only "if all the belligerents are parties to the Convention." Arts. 1 and 2.

The Convention was signed by all the States present at the Second Hague Conference, excepting China, Spain, and Nicaragua. The latter has since adhered. By July, 1911, it had been ratified by about half the States represented.

§§ 200–204; *Ibid.* (4th ed.), §§ 175–180; Longuet, §§ 110–133; Lönig, in 4 and 5 *R. D. I.* (1872 and 1873), 622 ff. and 69 ff.; Lorriot, *De la nature de l'occupation de guerre* (1903); Lueder, in 4 Holtzendorff, 468–524; Magoon, *Law of Civil Government under Military Occupation* (2d ed., 1900), *passim;* 2 G. F. de Martens, §§ 279–280; 3 F. de Martens, §§ 117–120; * 7 Moore, *Digest*, §§ 1143–1155; * Mérignhac, Nos. 118–153; * 2 Oppenheim, §§ 133–148, 166–172; 2 Piédelièvre, Nos. 971–1046; * Pillet, chs. 9–10, and pp. 477–484; 7 Pradier-Fodéré, Nos. 2939–3064; * 2 Rivier, 299–327; Rolin-Jacquemyns, in 2 and 3 *R. D. I.* (1870 and 1871), 666 ff. and 311 ff.; * Scott, *Cases*, 655–674; Snow, *Cases*, 364–385; * Spaight, chs. 11–12; * Takahashi, Pt. II, chs. 9–10; Taylor, §§ 529–544, 568–579; 2 Twiss, §§ 62–71; Ullmann (2nd ed.), §§ 183–184; Vattel, liv. III, §§ 73, 160–165, 197–200; Wehberg, *Das Beuterecht im Land und Seekriege* (1909), 1–36; * 2 Westlake, 83–107; Wheaton, §§ 346, 352–355; * Wilson, chs. 14 and 18; Zorn, *Das Kriegerecht zu Lande* (1906), 297–315.

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CHAPTER XXVII

THE LAWS OF MARITIME WARFARE

401. **The Aims and Means of Maritime Warfare.** — The general purpose of warfare at sea is the same as that on land, viz. the overpowering or reduction of the enemy's forces with the least possible expenditure of life and property; but the specific aims are somewhat different.[1] The most important of these are: the defeat or destruction of the enemy's warships; the destruction of fortifications, arsenals, and military establishments on the enemy coast; the blockade[2] of particular ports or portions of such coast; the prevention of the carriage of contraband to the enemy, and various forms of unneutral service; the support or defeat of certain land operations, such as the landing of troops; and the defense and protection of the home coasts and of commerce.[3]

The chief means through which it is sought to realize these aims are: the seizure or destruction of enemy vessels; the seizure and appropriation of enemy goods on such vessels; the bombardment of fortified places on the enemy coast; the cutting of submarine cables connecting enemy territory;[4] blockade; ruses; espionage; and the capture of neutral vessels engaged in unneutral service or the carriage of contraband goods.

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[1] On the *Aims and Means of Maritime Warfare*, see especially: Bonfils, No. 1268; * 2 Oppenheim, §§ 173–175; and 8 P.-Fodéré, Nos. 3066–3068.

[2] Because of their bearing on the rights and duties of neutrals, the subjects of blockade and contraband will be dealt with in Part VI under the head of "Neutrality."

[3] "The special objects of maritime warfare are: the capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks, and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land; and to protect and defend the national territory, property, and sea-borne commerce." Art. 1 of Stockton's Naval War Code (officially promulgated in 1900, but withdrawn in 1904).

[4] On the rules governing the cutting of submarine cables, see *supra*, § 397.

Though there is a great similarity between the rules of land and maritime warfare, there are also important differences. Consequently, a separate treatment of the subject is advisable. Unfortunately, we have no Hague Code to guide us in this enterprise as in the case of warfare on land; but we have fragments of such a Code in several of the Hague Conventions, and the promise of one in the near future.[5]

402. **The Theater of Naval Warfare.** — "The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction, and the territorial waters of belligerents. Neither hostilities nor any belligerent rights, such as that of visitation and search, shall be exercised in the territorial waters of neutral States."[6]

1. LAWFUL BELLIGERENTS IN MARITIME WARFARE

403. **Privateering and Conversion of Merchantmen into Warships.** — "Privateering is and remains abolished."[7]

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[5] Among the wishes expressed by the Hague Conference of 1907, was one that "the preparation of regulations relative to the laws and customs of naval warfare should figure in the program of the next Conference, and that in any case, the Powers may apply, as far as possible, to war by sea the principles of the Convention relative to the Laws and Customs of War on Land." Higgins, 69, or Scott, *Texts*, etc., 139.

It may therefore be taken for granted that the laws of land warfare apply to the omissions in this chapter.

[6] Art. 5, § 1, of S. C. (Stockton's Code). It may be recalled in this connection that the Suez Canal and certain rivers (the Congo, Niger, and a portion of the Danube) are neutralized. In this respect the Panama Canal may be said to be partially neutralized. See *supra*, § 201.

[7] D. P. (Declaration of Paris of 1856), Art. 1. Higgins, 2. *Cf. supra*, § 73.

Privateers have been defined as "vessels owned and manned by private persons, but empowered by a commission from the State, called a Letter of Marque, to carry on hostilities." Lawrence (4th ed.), § 200. They correspond somewhat to irregular troops on land warfare.

In 1870 Prussia attempted to create the first "Volunteer Navy," which was, however, to be placed under naval discipline and command, during the Franco-German War. France protested against this plan as a disguised form of privateering, but the British Law Officers to whom the matter was referred gave it as their opinion that there was a "substantial difference" between such a scheme and privateering. In 1877–1878 Russia accepted the offer of a patriotic association to create a Volunteer Fleet, to be placed under the command of naval officers and the crews subjected to military discipline. Great Britian and the United States have adopted a somewhat different system. They have entered into

The laws, rights, and duties of maritime warfare apply not only to public warships, but to all properly commissioned merchantmen, fulfilling the following conditions:

(1) That of being "placed under the direct authority, immediate control, and responsibility of the Power whose flag" they fly.[8]

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arrangements with great steamship lines, whereby, in return for subsidies, these companies agree to let or sell certain vessels to the Government at a fixed price on short notice, and to build new vessels according to certain specifications. France, Japan, and other Powers have made similar arrangements.

On *Privateering* (now a mere subject of historical interest) and *Volunteer Fleets*, see especially (for fuller select bibliography, see Bonfils, p. 816 of 5th ed.): Bluntschli, Art. 670; De Boeck, *De la propriété privée ennemie sous pavillon ennemie* (1882), *passim;* * Bonfils, Nos. 1362–1395; 4 Calvo, §§ 2297 ff.; Despagnet, Nos. 638–639; Dupuis, ch. 3; 3 Fiore, Nos. 1445–1453; Geffcken, in 18 *R. D. I.*, 369 ff.; Guihéneuc, *La marine auxiliare* (1900); * Hall (6th ed.), 518 ff.; 2 Halleck (3d ed.), 108–124; * Higgins, 312–314; * Lawrence (4th ed.), §§ 200–201; *Ibid.* (3d ed.), §§ 223–224; * 7 Moore, §§ 1215 ff.; 2 Oppenheim, §§ 83–84; Perels, § 34; 8 Pradier-Fodéré, Nos. 3092–3103; 2 Rivier, 253–259; Stark, in 8 Columbia Univ. *Studies*, 11–163, No. 3; Taylor, §§ 438–439, 497, Wehberg, *Das Beuterecht*, etc. (1909); Wheaton, § 358, and Dana's note 173; Wilson, §§ 133–134; Woolsey, §§ 127–129.

[8] 7 H. C. (Hague Convention of 1907 on the Conversion of Merchant Ships into Warships), Art. 1. Higgins, 309, or Scott, *Texts*, etc., 247. "The first article presents a principle which is, so to speak, the corollary of the Declaration of Paris, and has for its object to give every guarantee against a return more or less disguised to privateering." M. Fromageot, in 1 *Actes et doc. de la deuxième conf.*, 244. Cited by 1 Scott, 573. This may, indeed, be said to be the purpose of the Convention as a whole.

The immediate cause of the insertion of this subject in the program of the Second Hague Conference was a sensational incident of the Russo-Japanese War. In July, 1904, the world was electrified by the news that the *Peterburg* and *Smolensk*, two cruisers belonging to the Russian Volunteer Fleet in the Black Sea, had passed through the Straits and the Suez Canal disguised as merchantmen, and were searching and seizing neutral vessels in the Red Sea. There was great excitement in England when it was learned that the *Peterburg* had captured the British Mail Steamer *Malacca* on a charge of carrying contraband, and was bringing her to Port Said through the Suez Canal as a prize.

The British Government demanded the immediate release of the *Malacca* and protested on the grounds that its alleged contraband consisted of government stores consigned to Hong Kong, and that merchantmen (such as the *Peterburg* and *Smolensk* were assumed to be) could not lawfully exercise the rights of visit and search. Otherwise it would have been necessary to have assumed a violation of the series of international treaties by which the Straits were closed to warships. For Russia had "either broken a long line of solemn international compacts by sending commissioned warships through the Bosphorus and the Dardanelles in the guise of merchantmen, or she violated one of the most cardinal principles of International Law by permitting or authorizing merchant vessels to exercise the strictly belligerent right of search on the high seas." Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 151.

"(2) Merchant ships converted into warships must bear the external marks which distinguish the warships of their nationality.

"(3) The Commander must be in the service of the State and duly commissioned by the proper authorities. His name must figure on the list of the officers of the military fleet.

"(4) The crew must be subject to the rules of military discipline.

"(5) Every merchant ship converted into a warship is bound to observe, in its operations, the laws and customs of war.

"(6) A belligerent who converts a merchant ship must, as soon as possible, announce such conversion in the list of the ships of its military fleet." [9]

After a perfunctory or *pro forma* examination of the *Malacca's* cargo, she was released on July 27th, and the Russian Government agreed to instruct the officers of her Volunteer Navy to refrain from interference with neutral shipping in the future on the ground that "the present status of the Volunteer Fleet was not sufficiently well-defined, according to International Law, to render further searches and seizures advisable." But the *Smolensk* visited a British vessel as late as August 21, and the British Government was eventually forced to convey to the commanders of these cruisers the orders of the Russian Government.

On the case of the *Malacca*, see Hershey, 138–142, 148–152; Lawrence, *War and Neutrality*, etc. (2nd ed.), 202–216; and Smith and Sibley, Pt. I, ch. 2.

[9] 7 H. C. (1907), 1–6. These rules lay down the conditions regulating the use of Auxiliary or Volunteer Vessels or Fleets. *Cf. supra*, note 7.

The Convention has been signed by all the Powers mentioned in the Final Act except the United States, China, Dominica, Nicaragua, and Uruguay. Turkey signed under a general reservation. The United States witheld her signature for the same reason that she has never adhered in formal terms to the Declaration of Paris, viz. that our statesmen desire to see the abolition of the capture of unoffending private enemy property coupled with that of privateering. But there can be no doubt of our observance of these rules in practice. By July, 1911, the Convention had been ratified by 18 States.

Neither at The Hague nor at the London Conference of 1909 was it found possible to agree upon the important question of the place where the conversion of merchantmen may be effected. Great Britain, Japan, and the United States urged that such conversion should only be permitted in the ports of the country to which such vessels belonged, or in ports under military occupation. But the delegates of Germany, Russia, and France contended that it was permissible on the high seas, though M. Renault of France admitted it must not take place in neutral ports or neutral territorial waters. The Italian delegation proposed as a compromise that "ships which leave the territorial waters of their country after the opening of hostilities cannot change their character either on the high seas or in the territorial waters of another State." This proposition failed to secure the support of the leading Continental Powers.

An attempt to decide the period of duration of the conversion met with a similar fate, as also Lord Reay's attempt on behalf of Great Britain to divide warships into two classes: (*a*) fighting ships (*vaisseaux de combat*); and (*b*) auxiliary vessels

2. Restrictions on Capture in Maritime Warfare

The Hague Conference of 1907 placed the following restrictions on the exercise of the right of capture in maritime war:

404. **Inviolability of Postal Correspondence.** — "The postal correspondence of neutrals or belligerents, whether official or private in character, found on board a neutral or enemy ship is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

"The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port (Art. 1).

"The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible (Art. 2)."[10]

(*vaisseux auxiliares*), such as colliers, repairing vessels, supply ships, dispatch boats, transports, etc. He proposed the assimilation of auxiliary vessels to the status of fighting ships. But he met with the sound objection that the principles of "unneutral service" were involved in his proposition.

It would certainly seem that the conversion of merchantmen in neutral ports or waters is a gross violation of neutrality and that, if conversion on the high seas be permitted, it should be limited to vessels which have left their national ports before the outbreak of hostilities or to vessels captured from the enemy. Vessels once converted into warships should continue to bear that character during the whole period of the war.

The public character of a vessel is proved by her flag, her commission, and the presence of the proper naval officer in command. The word of the commander is usually regarded as conclusive evidence of her public character, though this can hardly be regarded as an absolute rule.

On the *Conversion of Merchantmen into Warships*, see especially: 1 and 3 *Actes et doc. de la deuxième conf.*, *passim*, particularly I, 232–245, for Fromageot's *Report;* Atherley-Jones, *Commerce in War*, 538–542; Bonfils (Fauchille), No. 1305; Bustamante y Sirven, ch. 14; Despagnet, 641–643; * Dupuis, *Le droit de la guerre maritime* (1911), ch. 3; * Higgins, 308–321; * Lawrence (4th ed.), § 202; * Lémonon, 611–622; * 1 Scott, 568–576; 2 Westlake, 304–306; Wilson, in 2 *A. J.* (1908), 271–275; *Ibid.*, *Int. Law*, § 134.

[10] 11 H. C. (1907), Arts. 1–2. *Cf.* Art. 20 of S. C. (Stockton's *Code*).

Herr Kriege (of Germany) deserves the credit for these proposals, which mark a distinct step in advance of the preëxisting law, since the rules on this subject were not clearly defined.

Within recent times there has developed a usage of exempting neutral mail steamers, not only from condemnation, but from visit, search, and capture as well.

405. **Exemption of Fishing Boats, etc.** — "Boats used exclusively in coast fisheries or in petty local navigation are exempt from capture, as also are their appliances, rigging, tackle, and cargo.

"This exemption ceases as soon as they participate in any manner in hostilities.

"The Contracting Parties bind themselves not to take advantage of the harmless character of said boats in order to use them for military purposes while preserving their peaceful appearance (Art. 3).

"Ships charged with religious, scientific, or philanthropic missions are equally exempt from capture (Art. 4)."[11]

But such immunity was regarded as a matter of pure "grace and favor." In the future such vessels must not even be searched unless in case of absolute necessity.

It should be particularly noted that such limited exemption from search extends only to *neutral* mail steamers. On the other hand, all correspondence, whether found on board a neutral or *enemy* ship, is to be held inviolable unless it is "destined for or proceeding from an enemy port."

Belligerents are to-day less averse to the exemption of ordinary postal correspondence from search than formerly because they prefer to communicate by means of the telephone or wireless telegraphy. "The advantage to be drawn by belligerents from the control of the postal service therefore bears no proportion to the prejudicial effect of that control on legitimate commerce." Herr Kriege, in 3 *Actes et doc. de la deuxième conf.*, 861.

The exemption, of course, does not include boats bearing special or noxious dispatches.

Russia was the only important State which did not sign this Convention. The explanation is probably to be found in the case of the *Prinz Heinrich* during the Russo-Japanese War. On this case, see Hershey, 139–140, 155–156; and Lawrence, *War and Neutrality*, etc. (2nd ed.), 109 ff. The pioneer in this matter of giving exemption to postal correspondence was the United States. See especially: Atherley-Jones, *Commerce in War*, 302; Dana, note 228 to Wheaton (Dana's ed.), 659–660; Hall (6th ed.), 681; Hershey, *op. cit.*, 154, n.; and Lawrence, *op. cit.*, 189, or *Principles* (3d ed.), p. 627.

On the general subject of this exemption, see: Atherley-Jones, 302 ff.; Baldwin, in *A. J.* (1908), 307 ff.; Benton, *Int. Law and Diplomacy of the Spanish-American War*, 131, 168 ff.; Bonfils (Fauchille), No. 1354; De Boeck, Nos. 207–208; Dupuis (1910), No. 112; *Hall (6th ed.), 680–681; *Hershey, 153–156; *Higgins, 401–402; * Lawrence, *War and Neutrality*, ch. 9, pp. 185–200; *Ibid.*, *Principles* (4th ed.), § 282; *Ibid.* (3d ed.), § 183; Lémonon, 698–701; Scott's *Cases* (for the important case of the *Panama*), 788–798; *Ibid.*, in 2 *Hague Conferences*, 614 ff.; Taylor, § 668; 2 Westlake, 265, 308; *Wheaton (Dana's ed.), note 228.

[11] 11 H. C. (1907), 3–4. Art. 3 safeguards and extends an immunity which has been generally observed, either as a matter of law or comity, and was not unknown even in the Middle Ages. It does not apply to deep sea fishing. "Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or

3. REGULATIONS REGARDING THE CREWS OF ENEMY MERCHANT SHIPS CAPTURED BY A BELLIGERENT

406. **Officers and Crew who are Nationals of a Neutral State.** — " When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

" The same rule applies in the case of the captain and officers, likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts (Art. 5)."

407. **When they are Nationals of the Enemy State.** — " The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they bind themselves, on the faith of a formal written promise, not to undertake, while hostilities last, any service connected with the operations of the war (Art. 6)."

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otherwise cured and made a regular article of commerce." Justice Gray, in the *Paquete Habana* and the *Lola*, 195 U. S. 677.

The phrase "coast fisheries" has been left undefined. There can be no doubt that the term "coast" is not limited to that of the fishermen's own country, but includes any coast where they have a right to fish. On the other hand, the phrase "petty local navigation" does not include coasting steamers. Higgins, 404.

The exemption of vessels engaged in religious, scientific, or philanthropic missions (Art. 4) dates back to the eighteenth century. It must be held subject to the same conditions as those laid down for fishing boats. They should be furnished with safe-conducts. On the subject matter of these articles, see especially: Baldwin, in *A. J.* (1908), 309–311; Benton, 174–175; Bordwell, 222; Dupuis, *Le droit de la guerre mar.* (1911), Nos. 106–111; * Hall (6th ed.), 444–447; * Lawrence (4th ed.), § 182; Lémonon, 702–709; 2 Oppenheim, §§ 186–187; * Scott, *Cases* (for an abridged report of the *Paquete Habana*), 19–21; Taylor, § 546; * 2 Westlake, 133–138, 310.

For a very complete review of the authorities and precedents, see the opinion of Justice Gray in the case of the *Paquete Habana*, 175 U. S. Rep. 677, in which our Supreme Court held that "it is an established rule of International Law that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their lawful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."

Other exemptions from capture are: (1) cartel ships, *i.e.* vessels used in the exchange of prisoners or other special services for the belligerents in accordance with agreements between them; (2) enemy ships protected by licenses so long as the terms of such permits are strictly observed; and (3) hospital ships, on which, see *infra*, §§ 416 ff.

It has sometimes been claimed that vessels shipwrecked on an enemy's coast or driven into an enemy's port by stress of weather are exempt from capture, but there is no international obligation to this effect.

"The names of the individuals retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said individuals (Art. 7)."

"The provisions of the three preceding Articles do not apply to ships taking part in hostilities (Art. 8)."[12]

4. TREATMENT OF THE SICK, WOUNDED, AND SHIPWRECKED IN NAVAL WARFARE[13]

The Hague Convention of 1907 for the Adaptation of the Principles of the Geneva Convention[14] to Maritime War contains the following provisions:

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[12] 11 H. C., Arts. 5–8. These Articles "mark an important alteration in the law of maritime warfare. It is, apart from this Convention, a well-recognized rule of International Law that the officers and crews of captured enemy merchantmen are prisoners of war. The practice was justified on the ground that it deprived the enemy of men who might render service on board ships which might be used as transports or for purposes of supply, or in the fighting navy. The rule was generally applied without regard to the nationality of the persons captured. . . .

"The Convention makes a definite and important change in a long-established rule of International Law, and confirms other usages which had been almost universally observed in regard to a class of persons who take no part in hostilities, who are for the most part poor men, and whose imprisonment, while inflicting extreme hardship on their families, did not afford a corresponding gain to their captors. The distinction between combatants and non-combatants which has for many years been recognized in the case of land warfare has now become recognized also in naval warfare." Higgins, 405–406.

Articles 5–8 would of course not apply in case of resistance or an unprovoked attack on the part of the merchantman. The Convention of which they form a part was signed by all the Powers represented at the Second Hague Conference excepting China, Montenegro, Nicaragua, and Russia.

On the subject matter of these Articles, see Baldwin, in 2 *A. J.* (1908), 311; Bordwell, 222–223; Bustamante y Sirven, ch. 19; * Hall (6th ed.), 400–401, n.; * Higgins, 405–406; * Lawrence (4th ed.), § 140; Lémonon, 710–714; 2 Oppenheim, § 185; 1 Scott, 618–620; 2 Westlake, 130, 309.

[13] The treatment of prisoners taken in naval warfare is omitted as being substantially (though not formally) covered by H. R., 4–20, on Land Warfare. *Cf. supra*, §§ 355 ff. See especially Arts. 10 and 11 of Stockton's Naval War Code. *Cf.* Holland, *Prize Law*, No. 240.

[14] *I.e.* the Geneva Convention of 1906. See *supra* §§ 369 ff. The Convention of 1907 is in form a new Convention, but it is really an amendment and enlargement of that of 1899 which had adapted the principles of the Geneva Convention of 1864 to maritime warfare. It consists, however, of twenty-eight articles instead of fourteen. The Additional Geneva Articles of 1868 served as a *modus vivendi* between 1868 and 1899, but they were never ratified. For the text of the "Additional Articles," see: Higgins, 14–17; Scott, *Text*, etc., 378–381; or Whittuck, 6–9.

408. **Military Hospital Ships.** — " Military hospital ships, that is to say, ships constructed or adapted by States specially and solely with the view of aiding the sick, wounded, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last.

" These ships, moreover, are not on the same footing as warships as regards their stay in a neutral port (Art. 1)."[15]

409. **Hospital Ships equipped by Private Individuals or Relief Societies.** — " Hospital ships equipped wholly or in part at the expense of private individuals or officially recognized relief societies shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

" These ships must be provided with a document from the proper authorities declaring that the vessels have been under their control while fitting out and on final departure (Art. 2)."[16]

410. **Hospital Ships equipped in Neutral Countries.** — " Hospital ships equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, *on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter* has notified their name *to his adversary* at the commencement of or during hostilities, and in any case, before they are employed (Art. 3)."[17]

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[15] 3 H. C. (1899) and 10 H. C. (1907), 1.

This article merely provides for the communication of the names of such vessels to belligerent Powers; but, as Bordwell (pp. 267–268) points out: "The names of the hospital ships may also well be sent to neutral as well as to belligerent Powers, in view of the exemption secured to them by this Article from the rule applicable to warships in neutral ports."

[16] *Ibid.*, 2. "The privileges of this article were extended to ships equipped by individuals as well as those equipped by officially recognized societies, in order to encourage the placing of craft such as private yachts, in the medical service." Bordwell, 268.

[17] *Ibid.*, 3. The *italicized* portions of this article were added in 1907. The Con-

411. **Duties of Hospital Ships.** — "The ships mentioned in Articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

"The Governments undertake not to use these ships for any military purpose.

"These vessels must in no wise hamper the movements of the combatants.

"During and after an engagement they will act at their own risk and peril."

412. **Rights of Belligerents over Hospital Ships.** — "The belligerents shall have the right to control and search them; they may decline their assistance, order them off, impose upon them a certain course, and put a commissioner on board; they may even detain them if serious circumstances require it.

"As far as possible the belligerents shall enter in the log book of the hospital ships the orders which they give them (Art. 4)."[18]

413. **Distinguishing Signs of Hospital Ships.** — "Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.

"The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth.

"The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

"All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, *and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed* (Art. 5)."[19]

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vention of 1899 had failed to regulate the relations between neutral hospital ships and belligerents. This defect is now remedied. *Cf.* G. C. (1906), 11.

[18] 3 H. C. (1899) and 10 H. C. (1907), 4. *Cf.* Add. Articles, 10 and 13.

[19] *Ibid.*, 5. *Cf.* G. C. (1906), 21 and 22. Persia reserved the right to use the Lion and Sun instead of the Red Cross.

The Conference of 1907 added the following paragraphs to Article 5 (which are relegated to this note as being of minor importance):

"The distinguishing signs referred to in Article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned (Art. 6)."[20]

414. **Sick Wards and Material on Hospital Ships.** — "In the case of a fight on board a warship, the sick wards shall be respected and spared as far as possible.

"These sick wards and the material belonging to them remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the wounded and sick.

"The Commander into whose power they have fallen may, however, in case of serious military necessity, apply them to other purposes, after first seeing that the wounded and sick on board are properly provided for (Art. 7)."[21]

415. **Rights of the Staff of Such Vessels.** "The protection to which hospital ships and sick wards are entitled ceases if they are used to commit acts harmful to the enemy.

"The fact of the staff of the said ships and sick wards being armed for maintaining order and defending the wounded and sick, and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection (Art. 8)."[22]

416. **Private Vessels with Sick and Wounded on Board.** — "Belligerents may appeal to the charity of the commanders of neutral merchantmen, yachts, or boats to take on board and tend the sick and wounded.

"Vessels responding to this appeal, as also the vessels which have of their own accord rescued wounded, sick, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board; but, subject to any undertaking that may have been given to

"Hospital ships which under the terms of Article 4 are detained by the enemy must haul down the national flag of the belligerent to whom they belong.

"The ships and boats above mentioned which wish to insure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain."

[20] 10 H. C. (1907), 6. *Cf.* G. C. (1906), 23. Arts. 6–9 are wholly new. This article was not accepted by Great Britain as necessitating a legislative enactment.

[21] *Ibid.*, 7. *Cf.* G. C. (1906), 6 and 15.

[22] *Ibid.*, 8. *Cf.* G. C. (1906), 7 and 8.

them, they remain liable to capture for any violations of neutrality they may have committed (Art. 9)." [23]

417. **Rights and Duties of the Staff, etc., of Captured Vessels.** — "The religious, medical, and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their private property.

"This staff shall continue to discharge its duties while necessary, and can afterwards leave when the Commander-in-chief considers it possible.

"The belligerents must guarantee to the said staff that has fallen into their hands *the same allowances and the same pay as are granted to the persons holding the same rank in their own navy* (Art. 10)." [24]

"Sailors and soldiers *and other persons officially attached to fleets or armies* who are taken on board when sick or wounded, whatever their nationality, shall be respected and tended by the captors (Art. 11)." [25]

418. **Sick, Wounded, or Shipwrecked on Board Military Hospital Ships.** — "Any warship belonging to a belligerent may demand the surrender of the wounded, sick, or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, and boats, whatever the nationality of such vessels (Art. 12)." [26]

[23] 10 H. C., 9. *Cf.* G. C. (1906), 5, and 3 H. C. (1899), 6. This article has been justly criticized on the ground of vagueness.

[24] 10 H. C. (1907), 10 and 3 H. C. (1899), 7. *Cf.* G. C. (1906), 9, 12, and 13.

[25] 10 H. C., 11, and 3 H. C (1899), 8. *Cf.* G. C. (1906), 1.

[26] 10 H. C. (1907), 12. This article is wholly new. The Hague Conference of 1899 failed to agree upon a plan for the proper disposition of sick, wounded, or shipwrecked belligerents rescued by neutral vessels. See Holls, 127–130, 500–506.

The British took a different view of their international obligations in the famous case of the *Deerhound* which arose during our Civil War. "The owner of this yacht, acting at the request of Captain Winslow of the *Kearsarge*, helped to rescue the officers and crew of the *Alabama* upon the occasion of the latter's sinking at the hands of the *Kearsarge*. To the surprise of Captain Winslow, the *Deerhound*, after picking up a certain number of men, largely officers (including Captain Semmes) of the *Alabama*, hastily and surreptitiously steamed off with its precious cargo to Southhampton. . . ." Hershey, 77 n. For the facts of the case, see *Claims against Great Britain*, III, 261–308 (1st sess., 41st Cong., 1869). For a somewhat different view of the law and the facts, see Bernard, *Neutrality*, etc., 429–430.

419. **On Board Neutral Warships.** — "If wounded, sick or shipwrecked persons are taken on board a neutral warship every possible precaution must be taken that they do not again take part in the operations of war (Art. 13)." [27]

420. **Treatment of Shipwrecked, Wounded, or Sick.** — "The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated, cannot serve again while the war lasts (Art. 14)." [28]

421. **Those landed at a Neutral Port.** — "The shipwrecked, wounded, or sick, who are landed at a neutral port with the consent of the local authorities, must, in default of an arrangement to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them from again taking part in the operations of the war.

"The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, wounded, or sick persons belong (Art. 15)." [29]

422. **Duties of Belligerents after each Engagement.** — "After each engagement, the two belligerents shall, so far as military interests permit, take measures to search for the shipwrecked, wounded, and sick, and protect them, as also the dead, against pillage and ill treatment.

"They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpses (Art. 16)." [30]

"Each belligerent shall send, as early as possible, to the authorities of their country, navy or army, the military marks or documents of identity found on the dead and a list of the names of the sick and wounded picked up by him.

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[27] *Ibid.*, 13. Inferentially, we may conclude that wounded, sick, or shipwrecked persons taken on board a neutral warship are not to be given up, but that they should be detained, interned, or paroled as in the analogous case of an army which has been forced to retreat into neutral territory. This was the course followed in a case which arose during the Russo-Japanese War. See Hershey, 75–77; and Lawrence, *War and Neutrality*, ch. 4

[28] 10 H. C. (1907), 14, and 3 H. C. (1899), 9. Bordwell (p. 275) considers the last paragraph of this article objectionable as amounting to compulsory parole.

[29] 10 H. C. (1907), 15. It also constituted Art. 10 of the third Convention of 1899, but was excluded from ratification.

[30] *Ibid.*, 16. *Cf.* G. C. (1906), 3. This article is wholly new.

"The belligerents shall keep each other informed as to the admissions into hospitals and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the wounded or sick who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country (Art. 17)." [31]

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[31] 10 H. C. (1907), 17. *Cf.* G. C. (1906), 4. This article is also wholly new.

The remaining articles of the Tenth Convention are of minor importance so far as the substance of International Law is concerned.

Art. 18 makes the usual reservation that "the provisions of the present Convention do not apply except between Contracting Parties, and only if all the belligerents are parties to the Convention."

Art. 19 provides that the "Commanders-in-chief of the belligerent fleets shall arrange the details for carrying out the preceding articles as well as for cases not provided for, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

In Art. 20 the Signatory Powers agree "to take the necessary measures to instruct their naval forces, especially the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the public."

In Art. 21 the Signatory Powers "undertake to enact or to propose to their Legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill treatment in respect to the wounded and sick in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks mentioned in Article 5 by vessels not protected by the present Convention." They also agree to "communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention."

"In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention are only applicable to the forces on board ship (Art. 22)."

The Tenth Convention of 1907 was signed by all the Powers represented at the Conference except Nicaragua. China made a reservation of Art. 21, and Great Britain of Arts. 6 and 21. Nicaragua has since given her adhesion to all the Hague Conventions excepting the Twelfth (Int. Prize Court). Only about half the Powers appear, however, to have ratified the Convention by July, 1911.

At a Conference of Maritime Powers held at The Hague in December, 1904, it was agreed that hospital ships fulfilling the conditions of Articles 1, 2, and 3 of the third Hague Convention of 1899 "shall be exempted, in time of war, in the ports of the Contracting Parties, from all dues and taxes levied on ships for the benefit of the State." "Great Britain did not take part in the Conference, owing to the fact that dues are levied by different authorities in the United Kingdom and legislation would be necessary to give effect to any Convention entered into." But the

5. SUBMARINE MINES

One of the most fearful weapons of modern naval warfare is that of submarine mines. The Hague Conference of 1907 adopted the following highly unsatisfactory rules designed for the restriction and regulation of the laying of automatic submarine contact mines:[32]

423. **The Hague Prohibitions.** — "It is forbidden:

"1. To lay unanchored automatic contact mines, unless they be so constructed as to become harmless one hour at most after the person who laid them shall have lost control over them.

"2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

"3. To use torpedoes which do not become harmless when they have missed their mark (Art. 1)."[33]

British Minister at The Hague stated that his Government was disposed to consider the proposal favorably. For the text of this Convention, see Higgins, 392–394.

On the *Hague Convention and Maritime Warfare*, see 1 and 3 *Actes et doc. de la deuxième conf., passim;* Bonfils (Fauchille), No. 1280; *Bordwell, 267–277; Dupuis, *Le droit de de la guerre mar.* (1911), Nos. 82–105; Fauchille et Politis, *Manuel de la Croix-Rouge* (1908), 122 ff.; *Higgins, 358–394; Holls, ch. 4 and App. C, pp. 497 ff.; Lawrence, *Principles* (4th ed.), § 165, pp. 408 ff.; Lémonon, 526–554; 2 Oppenheim, §§ 204–209; *Renault, in 2 *A. J.* (1908), 295–306; 1 Scott, ch. 13, pp. 598–614; Takahashi, Pt. III, ch. 4; 2 Westlake, 275–279.

[32] The necessity or desirability of legislation on this subject was made evident by the menace to neutral life and property which existed during the Russo-Japanese War. For the main facts, see Hershey, 124 ff; and Lawrence, *War and Neutrality* (2nd ed.), 93 ff.

At the Hague Conference of 1907, the Chinese delegate stated that "the Chinese Government is even to-day obliged to furnish vessels engaged in coastal navigation with special apparatus to raise and destroy floating mines which are found, not only in the open sea, but even in its territorial waters. In spite of the precautions which have been taken, a very considerable number of coasting vessels, fishing boats, junks and sampans have been lost with all hands without the details of the disasters being known to the western world. It is calculated that from five to six hundred of our countrymen engaged in their peaceful occupations have there met a cruel death in consequence of these dangerous engines of war." Higgins, 329.

[33] 8 H. C. (1907), 1. It would have been better to have accepted the British proposal to forbid the use of unanchored automatic submarine contact mines altogether. There seems to be no means of effective control over them.

"There is no certainty that floating mines, even if anchored at first, will not get loose, nor even much probability that a large percentage will not get loose." 2 Westlake, 322.

The Columbian proposal to forbid absolutely the employment of anchored mines, except as a means of defense, failed in Committee because of the lack of an

"4. It is forbidden to lay automatic contact mines off the coasts and ports of the enemy, with the *sole* object of intercepting commercial navigation (Art. 2)." [34]

424. **Necessary Precautions.** — "When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful navigation.

"The belligerents undertake to provide, as far as possible, that these mines become harmless after a limited time has elapsed, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice to mariners, which must also be communicated to the Governments through the diplomatic channel (Art. 3)." [35]

425. **Duties of Neutral Powers.** — "Neutral Powers which lay automatic mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

"The neutral Powers must give notice to mariners in advance of the places where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel (Art. 4)." [36]

426. **Duties of Belligerents at the Close of the War.** — "At the close of the war, the Contracting Powers undertake to do

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absolute majority. The vote stood sixteen for and fifteen against, with six abstentions. The objection was based on the difficulty of distinguishing between attack and defense. See Higgins, 338.

[34] 8 H. C. (1907), 2. It will be readily seen that the insertion of the word *sole* renders this article largely illusory. All attempts to limit the area within which mines might be laid failed. Great Britain had proposed that they might only be laid in territorial or belligerent waters, excepting that "before fortified military ports, however, this zone may be extended to a distance of ten miles from shore batteries, provided, etc." Higgins, 329–330.

[35] *Ibid.*, 3. This article is also largely illusory. There is no definite time limit within which anchored mines are to become harmless, and the phrase "military exigencies" may cover a multitude of sins of omission.

Arts. 1 and 3 were further weakened by the following provisions: "The Contracting Powers which do not at present own perfected mines of the description contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the *material* of their mines as soon as possible so as to bring it into conformity with the foregoing requirements (Art. 6)."

[36] *Ibid.*, 4. The limitation of the marine league imposed upon neutrals in the first draft Convention was suppressed. A Dutch proposal prohibiting mine laying in straits connecting the high seas was also suppressed, though the right of innocent passage is generally conceded.

their utmost to remove the mines which they have laid, each Power removing its own mines.

"As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters (Art. 5)." [37]

[37] *Ibid.*, 5. The Convention was concluded for seven years (Art. 10), and the Contracting Powers agreed to reopen the question of the employment of automatic contact mines six months before the expiry of this period in the event of the question not having been already taken up and settled by the Third Peace Conference (Art. 12).

The main defect of this Convention is its failure to prohibit the laying of mines, floating or anchored, on the high seas with such exceptions as might be deemed absolutely necessary. Belligerents should be forbidden to place mines off the coasts of the enemy for all purposes of commercial blockade, though they might well be permitted to use them for the protection of their own coasts even beyond the three-mile limit in certain cases.

The Convention is clearly inadequate as a means of protecting neutral shipping, and neutrals have a right to such protection, at least on the high seas — the common international highway — and in narrow straits through which they have the right of innocent passage.

The Convention has been signed or ratified by all the Powers represented at the Conference excepting China, Spain, Montenegro, Portugal, Russia, and Sweden. France and Germany made reservations as to Article 2. In signing the Convention, Great Britain made the following general reservation: "The mere fact that the said Convention does not prohibit a particular act or proceeding must not be held to debar His Britannic Majesty's Government from contesting its legitimacy." Turkey also made certain reservations respecting Arts. 1, 3, and 6.

The Institute of International Law at Ghent, in 1906, and again at Paris, in 1910, condemned the laying of mines, whether fixed or floating, on the high seas. But in other respects the rules of the Institute are not much in advance of those of the Hague Conference. Art. 4 is, however, an improvement. It interdicts the blockade of the ports or coasts of the enemy by means of automatic contact mines, though it authorizes them for naval or military, *i.e.* strategic, ends. For a good criticism of the rules of the Institute, see Dupuis, in 17 *R. D. I. P.* (1910), 597 ff.

At Madrid in 1911 the Institute adopted some additional articles, but they have no great importance. 24 *Annuaire*, 302.

On the *Eighth Hague Convention* and *Submarine Mines* generally, see * 21 *Annuaire* (1906), 88 ff. and 330 ff.; 22 *Annuaire* (1908), 222–227; 23 *Ibid.* (1910), 180 ff. and 440 ff.; 24 *Annuaire* (1911), 301 f.; Barclay, *Problems*, etc., 50 ff., 158; Bonfils (Fauchille), No. 1273; Bordwell, 280–282; Bustamante y Sirven, ch. 13; * Dupuis, *Le droit de la guerre mar.* (1911), ch. 13; *Ibid.*, in 14, 16, and 17 *R. D. I. P.* (1907, 1909, and 1910), 381–386, 162–163, and 597–607 respectively; * Hershey, 124–135; * Higgins, 322–345; * Lawrence, *Principles* (4th ed.), § 203; *Ibid.*, *War and Neutrality* (2d ed.), 94 ff.; *Ibid.*, *Int. Problems*, 121, 162, 190, 199; Lémonon, 472–502; Martitz, in 23 *Proceedings of Int. Law Assoc.* (1907); 2 Oppenheim, § 182; Rochall, *Die Frage der Minen* (1910); Schücking, in 16 *Zeitschrift für int. Priv. u. Stafrecht* (1906), 121 ff.; 1 Scott, 576–587; Stockton, in 2 *A. J.* (1908),

6. Bombardment by Naval Forces

427. **Hague Rules regulating Naval Bombardment.** — Bombardment by naval forces presents much that is analogous to bombardment by land troops.[38] On this subject the Hague Conference of 1907 formulated the following rules:

"The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings, is forbidden.[39]

"A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor (Art. 1)." [40]

"Military works, military or naval establishments, depôts of arms or war material, workshops, or plants which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them by artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

"He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

"If for military reasons, immediate action is necessary, and no delay can be allowed to the enemy, it is nevertheless understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander

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276–284; *2 Westlake, 322–326; **International Law Topics* (1905), 147–153; *Ibid.* (1908), 98–113.

[38] *Cf. supra*, § 382.

[39] *Cf.* H. R. (1907), 25. The all-inclusive phrase, *by any means whatever*, which was especially directed against certain much-feared practices of aërial warfare on land, inserted in H. R., 25 (see *supra*, § 382), was omitted in 9 H. C., 1.

"The meaning of the term 'undefended' engaged the attention of the Committee, but owing to the difficulty of distinguishing between the defense of a coast and of a town near the coast, no definition was attempted." Higgins, 354.

[40] 9 H. C. (1907), 1. The second paragraph of this article was strongly opposed by Great Britain, Germany, France, and Japan, who entered reservations respecting this rule. Their attitude is approved by Westlake (II, 315). He says: "They were right. A place cannot be deemed undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open to the enemy to enter." *Cf.* Bordwell, 289, Lawrence (4th ed.), p. 543, and Higgins, 954, to the same effect.

shall take all due measures in order that the town may suffer as little harm as possible (Art. 2)."[41]

"After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

"These requisitions shall be proportional to the resources of the place. They shall be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged (Art. 3)."[42]

"The bombardment of undefended ports, towns, villages, dwellings, or buildings, for the non-payment of money contributions, is forbidden (Art. 4)."[43]

"In bombardment by naval forces all necessary measures should be taken by the commander to spare as far as possible buildings devoted to public worship, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

"It is the duty of the inhabitants to indicate such monuments, buildings, or places by visible signs, which shall consist of large stiff rectangular panels, divided diagonally into two colored triangular portions, the upper portion black, the lower portion white (Art. 5)."[44]

"Unless military exigencies do not permit it, the commander of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities (Art. 6)."[45]

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[41] 9 H. C., 2. Arts. 2 and 3 furnish exceptions to Art. 1. "This article might, and probaby will, be held to confer a right on a commander to destroy by bombardment railway stations, bridges, entrepôts, coal, stocks, whether belonging to public authorities or private persons." Higgins, 355.

[42] *Ibid.*, 3. *Cf.* H. R., 42. As pointed out by Higgins (pp. 355–356), the punishment herein provided for a failure promptly to comply with a request for requisitions seems excessive. It would be more humane to follow the suggestion of Hall (6th ed., p. 430) to land a naval force and proceed as in the case of warfare on land.

[43] *Ibid.*, 4. This article finally disposes of the outrageous claim urged in some quarters that the exaction of ransom from coast towns or cities is permissible.

[44] *Ibid.*, 5. *Cf.* H. R., 27.

[45] *Ibid.*, 6. *Cf.* H. R., 26.

"It is forbidden to give over to pillage a town or place, even when taken by assault."[46]

7. Capture of Enemy Goods and Vessels and Treatment of Prizes

428. **Seizure of Enemy Vessels.** — One of the most important means of maritime warfare is the attack upon and seizure of enemy vessels and the confiscation of enemy goods found on such vessels. All public vessels belonging to the enemy (especially warships) are subject to attack, seizure, or destruction by a belligerent man-of-war on the high seas or within the territorial waters of either belligerent. Enemy merchantmen can only be attacked if they refuse to submit to visit after having been duly signalled.[47]

429. **How Seizure is Effected.** — Seizure of an enemy merchantman is usually effected by sending an officer and a portion of the crew of the attacking ship on board the captured vessel.[48] She is then, as a rule, taken to a Prize Court of the captor and adjudicated upon.[49]

430. **Destruction of Enemy Prizes.** — Enemy prizes may be directly appropriated, sold, or destroyed for exceptional reasons,

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[46] 9 H. C., 7. *Cf.* H. R., 28. With several exceptions indicated above, this Convention must be pronounced satisfactory. It has been signed or adhered to by all the Powers represented at the Conference except Spain.

On the *Ninth Convention and Naval Bombardments*, see especially: 3 *Actes et doc. de la dieuxième conf., passim;* *15 *Annuaire* (1896), 145–151, 309–315; Barclay, *Problems*, etc., 51–52; Bonfils (Fauchille), No. 1277; Bordwell, 288–291; Bustamante y Sirven, ch. 16; * Dupuis, *Le droit de la guerre maritime* (1899), Nos. 67–72; *Ibid.*, (1911), Nos. 42–47; Hall (6th ed.), 429–430; Hershey, 311–316 (see note on pp. 312–315 for citations from the authorities); * Holland, *Studies*, 96 ff.; Lawrence, *Principles* (4th ed.), § 204, pp. 541–543; *Ibid., Int. Problems.*, etc., 119 ff.; Lémonon, 503–525; * 7 Moore, *Digest*, §§ 1166–1174; 2 Oppenheim, § 213; 1 Scott, 587–598, or 2 *A. J.* (1908), 285 ff.; * Stockton's *Naval War Code*, Art. 4; 2 Westlake, 315–317.

[47] Most publicists contend that it is permissible for a man-of war to use a false flag: (1) in approaching an enemy vessel for the purpose of drawing it into action; (2) when chasing an enemy ship; and (3) when attempting to escape. But it is agreed that she must fly her nation's flag before beginning the attack. 2 Oppenheim, § 211. For citation of authorities see *Ibid.*, note on p. 217.

[48] If this is impracticable, the captor orders the captured vessel to lower her flag and follow a prescribed course.

[49] On the *Origin of Prize Courts*, see especially: 2 Oppenheim, § 192; * 2 Twiss, §§ 74–75; and 2 Westlake, pp. 122 ff.

such as unseaworthiness, the presence on board of infectious or contagious disease, stress of weather, serious danger of recapture, shortage of coal, lack of a prize crew, or serious danger to the success of military operations.[50] If the destruction itself be lawful, it would seem that the neutral owners of goods thus destroyed must not expect the payment of indemnity.[51]

431. **Recapture.** — In case of recapture at sea, the vessels and other property recaptured from the enemy are usually restored to the original owners on the analogy of the Roman *jus postliminii*, which restored to persons and things their original status upon rescue from the power of the enemy. The mode and conditions of restoration are determined by Municipal Law,

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[50] See *Project* for the International Regulation of Maritime Prizes adopted by the *Institute of Int. Law* (1882–1887), Art. 50 in *Tableau*, etc., p. 205 f., or 9 *Annuaire*, 228; *Russian Prize Regulations* (1895), Art. 21; *Japanese Regulations* (1904), Art. 91; Holland's *Manual of Prize Law* (1888), p. 86; Stockton's *Naval War Code* (1900), Art. 50; and *Instructions* issued by the Navy Department of the United States (1898), General Order 492. The student will find these various articles collected by Wilson, note on pp. 305–307.

Great Britain only permits destruction in case the vessel is not in a condition to be sent into any port for adjudication or if the Commander is unable to spare a prize crew. Holland, *op. cit.*, p. 86.

The Instructions issued by our Navy Department declare:

"The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself or its cargo is needed for immediate public use, it may be converted to such use; a careful inventory and appraisal being made by impartial persons and certified to by the prize court.

"If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony shall be sent to the prize court in order that a decree may be duly entered." 7 Moore, *Digest*, p. 518; and Wilson, 304.

The case of the destruction of enemy prizes should be carefully distinguished from that of neutral prizes. This distinction has not always been made. *Cf. infra*, .

On the *Destruction of Enemy Prizes*, see especially: Atherley-Jones, *Commerce in War*, 528–531; * Boeck, Nos. 268–285; Bonfils (Fauchille), No. 1415; 5 Calvo, §§ 3028–3034; * Dupuis (1898), Nos. 261–268; *Ibid.*, (1911), No. 208; * Hall (6th ed.), 452–455 and notes; Hershey, 156–159; 2 Kleen, *De la neutralité*, 529–534; Lawrence (4th ed.), § 191; * 7 Moore, *Digest*, § 1212; 2 Oppenheim, § 194; 2 Westlake, 318 ff.; Wilson, § 131.

Cf. references on *Destruction of Neutral Prizes*, *infra*, p. 522.

[51] At least it was so held by the French *Conseil d'État* in 1870 in the cases of the seizure of two German merchantmen. See 5 Calvo, § 3033; Dupuis (1899), No. 262; Hall (6th ed.), 719–720; and 2 Westlake, 318–319.

since, according to International Law, the title to the recaptured vessel or property is really vested in the States whose forces have made the recapture.[52]

432. **Disposition of Prizes.** — After a prize is sold, it is usually condemned, and the whole or part of the net proceeds divided among the officers and crew of the vessel which made the capture.[53]

8. ENEMY CHARACTER IN NAVAL WARFARE

433. **Declaration of Paris.** — The Declaration of Paris (1856) lays down the following important rules of exemption from the right of capture at sea:

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[52] The United States grants restoration to the original owners on payment of salvage awarded by the courts, provided the recapture is effected prior to condemnation by a properly constituted enemy prize court. France adopted the twenty-four rule as early as 1584, and restores on the payment of a thirtieth as salvage if the capture is effected within twenty-four hours of the original capture, though one tenth is demanded if a longer time has elapsed.

The most liberal rule is that of England. The Naval Prize Act of 1864 (§ 40) provides that, except in case of use as a warship, the recaptured vessel shall be restored to her former owner on payment of from one eighth to one fourth salvage if the recapture has been effected at any time during the war. Some of the smaller States follow the English usage; others, *e.g.* Prussia, follow the rule of the Consolato del Mare, which restored the vessel to the original owner on payment of a reasonable salvage in case of recapture before it had been taken into port or to a place of safety (*infra praesidia*) by her captors. The rule adopted by the United States would seem to be the most reasonable.

On *Recapture*, see especially: *Atherley-Jones, ch. 9; *De Boeck, Nos. 286–318; Bonfils, No. 1416; 5 Calvo, §§ 3186–3226; Davis (3d ed.), 366–368; *Dupuis (1899), Nos. 278–281; *Hall (6th ed.), 456, 487–489; *2 Halleck (Baker's 3d ed.), 510–527; *Lawrence (4th ed.), § 185; *7 Moore, § 1213; 2 Oppenheim, § 198; Perels, 226–228; *3 Phillimore, Pt. X, ch. 6, §§ 403 ff.; 2 Rivier, 357–359; Scott, *Cases*, 649–654; Taylor, § 559; 2 Westlake, 156–158; Wheaton, §§ 367 ff.; Woolsey, §§ 151–152. See *Tableau*, p. 221, for rules adopted by the Institute of Int. Law.

[53] This practice is still followed by most States, but was abolished by the United States in 1899. See 7 Moore, *Digest*, § 1248. For information on this subject, see *Atherley-Jones, 560 ff.; Davis (3d ed.), 373; Halleck (Baker's 3d ed.), 365 ff.; *Holland, *Manual*, 142 ff., for the British Royal Proclamation as to distribution of prize money; *7 Moore, *Digest*, §§ 1245–1248, for former distribution of prize money in the United States.

At the Hague Conference of 1907 France proposed a wish that States still exercising the right of capture should suppress the shares of prize money assigned to the crews of the capturing ships; but, though adopted in committee by a vote of sixteen against four and fourteen abstentions, the matter was dropped. 2 Westlake, 313–314.

For a select Bibliography on *Prize Courts and Prize Procedure*, see *infra*, p. 532.

"The neutral flag covers enemy's goods, with the exception of contraband of war.

"Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."[54]

According to the terms of this Declaration, with the exception of contraband goods, neutral goods on enemy vessels as well as enemy goods on neutral vessels are, generally speaking, exempt from capture;[55] but enemy goods found on board enemy vessels are still subject to capture.[56]

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[54] Rules 2 and 3 of the *Declaration of Paris.* These rules adopt the principle of "free ships, free goods" without its supposed corollary "enemy ships, enemy goods."

On the *Declaration*, see especially * Higgins, 1–4. See *Idem*, p. 1 for select bibliography. *Cf. supra*, § 73.

[55] Further exceptions to these rules are found in the case of blockade runners and vessels engaged in unneutral service or hostile aid. See *infra*, chs. 32 and 34.

[56] There is at present a powerful movement, championed by the United States, in favor of the adoption of the principle of the inviolability or total immunity from capture of private unoffending enemy property at sea. The first official sanction of the abolition of this remaining form of "pillage" or "piracy" is found in the treaty of 1785 negotiated by Franklin between Prussia and the United States. In 1823 John Quincy Adams, then Secretary of State, proposed exemption of private property at sea to Great Britain, France and Russia — a proposition which Russia expressed herself as willing to accept on condition that all the other naval Powers should join in it. When our Government was invited to give its adhesion to the Declaration of Paris of 1856, it declined to do so unless the Declaration should be extended to include this exemption.

The principle was adopted by Italy in her Marine Code of 1865 and in a treaty with the United States in 1871. It was acted upon by Prussia, Austria, and Italy in the War of 1866. In 1904 the Congress of the United States adopted a resolution in its favor, and a memorial in its behalf was presented by the American delegation to the First Hague Conference. At the Second Hague Conference the proposition of the United States in favor of immunity of private unoffending enemy property from capture at sea received twenty-one yeas and eleven nays, with twelve States abstaining or not voting. Since the opposition included such great maritime Powers as Great Britain, France, Russia, and Japan, the proposal was considered lost.

The continued championship of this cause by the United States is all the more creditable from the fact that, in view of the strength of our navy and the small size of our merchant marine, it is somewhat doubtful whether our purely material interests lie in this direction.

The interests of Great Britain with her powerful navy and enormous carrying trade are more difficult to determine. They seem almost equally balanced, with the heavier weight inclining toward immunity.

Statesmen and international jurists appear to be equally divided in their opinions as to the desirability of this innovation. On the Continent of Europe there seems to be a preponderance of opinion in favor of it; but in England the weight of authority and public opinion still appears to be strongly opposed, though there is a great and growing sentiment in its favor. Among statesmen and publicists favoring immunity

434. **Tests of Enemy Character.** — In international practice there are applied two widely divergent criterions or tests of enemy

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might be cited: J. Q. Adams, Atherley-Jones, Barbosa, Von Bar, Bluntschli, De Boeck, Bonfils, Bulmerincq, Butler, Calvo, Cauchy, Choate, Cobden, Desjardins, Despagnet, Dudley Field, Fiore, Hamilton Fish, Foster, Geffcken, Gessner, Hall, Heffter, Holzendorff, De Laveleye, T. J. Lawrence, Lord Loreburn, De Mably, Maine, Mancini, F. de Martens, Massé, Marcy, President McKinley, President Monroe, Napoleon I, Neumann, Nys, Piedélièvre, Perels, Pinheiro-Ferreira, de Beer Poortugael, Pradier-Fodéré, Rivier, Rolin-Jacquemyns, White, Wehberg, Woolsey, and the majority of the members of the Institute of International Law in 1875, 1877, and 1882. (See *Tableau*, 190–192 and 196.)

Among those opposed to immunity might be cited: Admiral Aube, Bentwich, Bowles, Bynkerschoek, Dana, Funck-Brentano et Sorel, Grotius, Hall, Halleck, Harcourt, Hautefeuille, Holland, Kent, Latifi, Lorimer, Mahan, Manning, Oppenheim, Ortolan, Lord Palmerston, Phillimore, Pillet, Pistoye et Duverdy, Renault, Röpcke, Lord Salisbury, Sir Wm. Scott, Admiral Stockton, Testa, Twiss, Vattel, Westlake, Wheaton, Wildman, Wilson.

Lack of space permits anything like an adequate discussion of this interesting and important subject. The arguments of the advocates of immunity rest mainly upon considerations of humanity, progress, and the commercial interests of neutrals, if not of the belligerents themselves. They also urge that war is essentially or exclusively a relation between States, point to the analogies or resemblances between land and maritime warfare, claim that immunity would constitute an important step toward the limitation of war, and deny that one of the main objects of maritime warfare is the destruction of the enemy's commerce.

The opponents of immunity, speaking generally, claim that war is a relation between individuals as well as States, minimize the resemblances and emphasize the differences between land and naval warfare, deny that the abolition of the capture of private unoffending enemy property would tend to lessen the number or duration of wars, and urge that the destruction of the enemy's commerce is an essential aim of modern warfare.

Some of the more recent authorities deem it necessary to preserve the right of capture in order to "deprive the enemy of important resources, both of ships which might be available as transports or for purposes of supply; and of men who might render service on board ships so employed or in the fighting navy. . . ." 2 Westlake, 130.

But according to 11 H. C., 6 (see *supra*, §§ 406 ff.), crews of captured enemy merchantmen are no longer to be made prisoners of war on condition, etc., and enemy vessels adapted or available for use as transports or for supply might be excepted from the rule of non-capture. In any case it is difficult to see why it is necessary to confiscate either the vessel or the goods in the case of such merchantmen as may have been captured from a sense of military precaution or necessity. Sequestration or preemption would surely be sufficient in such cases. A fuller agreement as to the conditions under which merchantmen may be converted into warships in time of war would also materially assist in the solution of this problem, which is not so difficult as it is made to appear.

It is also feared that the abolition of capture would lead to a straining of the laws of blockade and contraband. It may be admitted that there is some danger of this, but it is the business of statesmen and governments to prevent such a result.

For arguments pro and con on the *Abolition of the Capture of Private Unoffending* character. France and some of the other European States[57] apply the test of political nationality. The Anglo-American system, which is also applied in a somewhat modified form by Japan, makes enemy or neutral character in maritime warfare depend upon commercial or trade domicile.[58]

Property at Sea, see especially: Barclay, *Problems*, etc., 63–70, 172–179; Bentwich, *War and Property at Sea* (1907), 84–96; Bluntschli, in 9 and 10 *R. D. I.*, 508 ff. and 60 ff.; * De Boeck, Nos. 381 ff.; * Bonfils (Fauchille), Nos. 1299–1338; Butler, in 168 *No. Am. Rev.* (1899), 54, ff.; 4 Calvo, §§ 2294–2410; * Choate, in *American Addresses*, 1–24; Cobbett, in Mahan's *Neglected Aspects of War*, 117 ff.; Despagnet, Nos. 643–645; Dupuis, *Le droit de la guerre maritime* (1899), Nos. 24 ff.; *Ibid.*, (1911), Nos. 25 ff.; 3 Fiore, Nos. 1399–1413; Fromagoet, in 2 Scott, 701–704; Hall (6th ed.), 437–444; *Ibid.*, in 26 *Contemp. Rev.* (1875), 737 ff.; Holls, *Peace Conference*, 306–321; * Latifi, *Effects of War on Property* (1909), ch. 5; * Lawrence, *Principles* (4th ed.), § 194; *Ibid.* (3d ed.), § 216; * Mahan, in *Neglected Aspects of War* (1907), 157 ff.; 7 Moore, *Digest*, § 1198; * 2 Piedélièvre, Nos. 1108–1116; * 8 Pradier-Fodéré, Nos. 3066 ff.; Röpke, *Das Seebeuterecht* (1904); Stockton, in 1 *A. J.* (1907), 930–943; Wehberg, *Das Beuterecht* (1909), 76 ff.; * 2 Westlake, 129–132; *Ibid.*, in Latifi, 145 ff.; *Ibid.*, in 7 *R. D. I.*, 678 ff. For Bibliographies, see De Boeck, Bonfils, Wehberg, etc.

[57] **Le Hardy* v. *La Voltigeante*, 1 Pistoye et Duverdy, 321 and Snow *Cases*, 337. In this leading case it was held that a neutral merchant domiciled in a belligerent country does not acquire a belligerent character, and that his property at sea is to be regarded as neutral.

[58] For the leading cases on *Commercial Domicile*, see Scott, 585–607, or Snow, 315–336. For Bibliography see *supra*, p. 273.

It should be noted that the tests for determining commercial or trade domicile in war are not quite the same as those for determining ordinary or civil domicile based purely on residence. For the distinction between Civil and Commercial Domicile, see Dicey, *Conflict of Laws*, 737.

"Residence in a neutral country will not protect [a merchant's] share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country." Wheaton, § 335. Indeed, Lord Stowell held that a merchant might have several trade domiciles, and the property of nationals has been ruthlessly confiscated by English and American courts because of its hostile origin.

The memorandum setting forth the views of the British Government for the benefit of the London Conference of 1909 gives the following summary of the Anglo-American doctrine:

"1. The principle adopted by the British Courts has been to treat the domicile of the owner as the dominant factor in deciding whether property captured in time of war is enemy property; but for this purpose the principle is not limited in all respects to the domicile of origin or residence, and is applied in the following way:

"(*a*) A person domiciled in a neutral country, but having a house of trade in an enemy country is deemed to acquire a commercial domicile in the enemy country in respect of transactions originating there; but the other property of such owner is not affected thereby.

"(*b*) A commercial domicile not being the domicile of nationality is terminated

435. **Rules Respecting Enemy Character Adopted by the London Conference of 1909.** — The London Naval Conference which met in 1908–1909 discussed this subject at length, but was unable to come to any agreement beyond these general rules:

"Subject to the provisions[59] respecting transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

"The case where a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in no wise affected by, this rule (Art. 57)."[60]

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner (Art. 58)."[61]

when actual steps are taken *bona fide* to abandon such domicile for a different one *sine animo revertendi.*

"2. This principle applies equally to the cases of an individual, a partnership, or a corporation, residence in the two latter cases being understood to mean the place whence the business is controlled.

"3. In the case of a partnership where one or more of the partners is domiciled in enemy territory, property not liable to be seized as enemy property on other grounds, is presumed to be divided proportionally between the partners, and the share attributed to a partner domiciled in enemy territory is deemed to be enemy property." *Parliamentary Blue Book, Miscel.*, No. 4 (1909), p. 11.

Much of the law of domicile as applied to maritime capture is or should be regarded as obsolete. It is based upon the antiquated conception of war as a hostile relation between individuals as well as States, and an exaggerated idea of the importance of the capture of property *which might possibly* increase the enemy's resources. It is an illiberal and complicated system — a travesty upon justice supported by legal casuistry. Besides, it is a weak and ineffective weapon of warfare, and has, therefore, no military justification.

At the London Conference of 1909, all the great maritime Powers (including Great Britain) finally ranged themselves on the side of the principle of nationality (with the exception practically of the United States), thus leaving us in the unenviable position of sole champion of this survival of Toryism in International Law.

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[59] See *infra*, § 436.

[60] D. L. (Declaration of London), Art. 57. The first paragraph embodies a recognized principle of International Law. See *supra*, § 207. The second refers to the famous Rule of 1756, usually regarded as obsolete. See *supra*, § 65 n.

For the text of these rules and the official *Report* to the Conference, see Higgins, 560–561; and *Int. Law Topics* of the Naval War College (1910), 130 ff.

"Article 57 safeguards the provisions respecting transfer of flag, as to which it is sufficient to refer to Articles 55 and 56 (see *infra*, § 436); it might be that a vessel would really have the right to fly a neutral flag, from the point of view of the law of the country to which she claims to belong, but may be regarded as an enemy by a belligerent, because the transfer in virtue of whch she has hoisted the neutral flag, is annulled by Article 55 or by Article 56." *Report, op. cit.*

[61] D. L., 58. But what is to determine the neutral or enemy character of the

"If the neutral character of goods found on board an enemy vessel is not proven, they are presumed to be enemy goods (Art. 59)."[62]

"The enemy character of goods on board an enemy vessel continues until they reach their destination, notwithstanding an intervening transfer after the opening of hostilities while the goods are being forwarded.

"If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of a present enemy owner, a legal right to recover the goods, they regain their neutral character (Art. 60)."[63]

436. **Transfer to Neutral Flag.** — "The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the opening of hostilities. Proof to the contrary is admitted.

"There is absolute presumption of the validity of a transfer effected more than thirty days before the opening of hostilities if it is absolute, complete, and conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits arising from her employment do not remain

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owner? Is it domicile or nationality? It was found impossible to agree on this point, the maritime Powers being about equally divided.

An unsuccessful attempt was made to agree upon the following rules as a compromise:

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, in case of lack of nationality or of double nationality (neutral or enemy) of the owner, by his domicile in a neutral or enemy country.

"The goods belonging to a limited liability or joint stock company are, however, considered as neutral or enemy according as the company has its headquarters in a neutral or enemy country."

[62] D. L., 59. "Art. 59 enunciates the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods; this is merely a simple presumption, leaving to the claimant (not only) the right, but (also) the burden, of proving his rights." *Report* on the Declaration of London, in Higgins, 605; or in *Int. Law Topics* (1910), 135.

[63] D. L., 60. "This provision contemplates the case where goods which were enemy property at the time of departure have been the subject of a sale or transfer during the course of the voyage. . . ." *Report, op cit.*

in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would give no right to damages (Art. 55)." [64]

" The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

" There is, however, absolute presumption that a transfer is void:

" (1) If the transfer has been made during a voyage or in a blockade port.

" (2) If there is a right of redemption or recovery.

" (3) If the requirements upon which the right to fly the flag depends according to the laws of the country under which the vessel is sailing, have not been observed (Art. 56)." [65]

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[64] D. L., 55. For a good commentary on this article, see *Report*, etc., in Higgins, 600 f.; or *Int. Law Topics* (1909), 123 f. See also Bentwich, *The Dec. of London* (1911), 104-107.

[65] D. L., 56. See commentaries *op. cit.* These rules apply to *vessels*.

It is a principle of Anglo-American Law that, in time of war or in contemplation thereof, *goods* shipped on account of the consignee are regarded as his goods from the time of shipment, and he cannot divest himself of this risk by special agreement. The *Packet De Bilboa* (1799), 2 C. Rob. 133, and Scott, 609. But it seems that the French rule permits the shipper to take such risk. *Les Trois Frères*, Pistoye et Duverdy, 357, and Snow, 348.

For leading cases on the *Ownership and Transfer* of *Goods in Transit*, see Scott, 607–628; or Snow, 339–355.

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For bibliography on prize law, see *infra*, p. 532. For references on the *London Naval War Conference* of 1909, see *supra*, p. 86.

CHAPTER XXVIII

AËRIAL WARFARE

Recent inventions in modes of aërial transportation and communication, notably by means of the aëroplane, dirigible balloons, and wireless telegraphy, make it seem necessary (or at least desirable) to deal separately with aërial warfare.

437. **Few Positive Rules of Aërial Warfare.** — Very few positive rules or principles of International Law applicable to this field of future warfare have been thus far developed. The rules are largely inferential and speculative in their character, and are based upon generally recognized principles or analogous practices in land or naval warfare.

438. **The Hague Declaration.** — Many of the States represented at the Second Hague Peace Conference of 1907 agreed to "prohibit, *for a period extending to the close of the Third Peace Conference*, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."[2] But this "Declaration" was only signed by twenty-seven States, and the Signatories did not include four of the great maritime Powers.[3] It cannot, therefore, be regarded as an integral part of International Law.

439. **The Hague Regulations.** (*a*) **As to Bombardment.** — The only positive rule of International Law bearing directly on the subject of aërial warfare which is based upon convention is found in the Hague Regulations respecting the Laws and Customs of War on Land:

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[1] *Cf.* the *Law of Aërial Space in Time of Peace, supra*, ch. 15.

[2] 1 H. D. (1907). Higgins, 485–491. See select Bibliography, *Ibid.*, p. 488.

[3] Viz. Germany, Italy, Russia, and Japan. The remaining non-Signatory Powers were Chile, Denmark, Spain, Guatemala, Mexico, Montenegro, Nicaragua (which has since adhered), Paraguay, Roumania, Servia, Sweden, and Venezuela. It should be noted that the United States was among the Signatories.

"The attack or bombardment, *by any means whatever*, of towns, villages, habitations, or buildings which are not defended is forbidden (Art. 25)." [4]

440. (*b*) **On Wireless Telegraphy.** — But the following rules may be said to bear indirectly on the subject:

"Belligerents are also forbidden: (*a*) To erect on the territory of a neutral Power a wireless telegraphy station, or any apparatus intended to serve as a means of communication with belligerent forces on land or sea;

"(*b*) To use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages (Art. 3)." [5]

"A neutral Power is not bound to forbid or restrict, on behalf of belligerents, the use of telegraphic or telephonic cables or wireless telegraphy apparatus, whether belonging to it or to companies or private individuals (Art. 8)." [6]

441. **The Theater of Aërial Warfare.** — Though there are no positive or conventional rules bearing on the subject, it is clear from general principles or analogous customs of warfare at sea or on land that belligerents have the right of waging aërial warfare in the aërial space surrounding the ocean as well as in that above their own territory or above territory under their military occupation (including the marginal seas bordering on such territory). But they do not have the right of using the aërial space surrounding the territory of neutral States (including their marginal waters) for military purposes.

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[4] H. R. (1907), 25. *Cf. supra*, § 382.

[5] H. C. (1907), 3. This article was suggested by the experiences of the Russo-Japanese War, when the Russians erected a receiving station at Chefoo in China for the purpose of communicating with Port Arthur by wireless telegraphy. See Hershey, 122, 124, 266–267; Higgins, 282–283, 291; Lawrence, *War and Neutrality* (2nd ed.), 213–220; and Scholtz, *Drahtlose Telegraphie u. Neutralität*, 13 ff.

Art. 5 of 5 H. C. also makes it obligatory upon neutrals not to permit such acts on its territory.

According to 13 H. C. (1907), 5, belligerents are particularly forbidden to "erect wireless telegraphy stations, etc." in neutral ports or waters. *Cf. infra*, § 461.

[6] 5 H. C., 8. Art. 9 adds: "Every restrictive or prohibitive measure taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be applied impartially by it to the belligerents.

"The neutral Power shall see to it that the same obligation is observed by companies or private owners of telegraph or telephone cables or of wireless telegraphy apparatus."

442. **Restrictions on Neutrals.** — It is also reasonably clear that belligerents have the right of forbidding or restricting the access to, or use of, the aërial space above belligerent territory by neutrals, if such restriction or prohibition is deemed necessary or desirable from a military standpoint.[7] They have probably also the right to impose certain restrictions or prohibitions upon neutrals above the high seas within the zone or theater of military operations.[8] They may impose appropriate penalties for the violation of these rules.

443. **Some Doubtful Points.** — Whether the so-called innocent passage of public belligerent airships through neutral aërial space or the utilization by such airships of neutral territory for such relatively innocent purposes as repairs, the procuring of necessary supplies, etc., is permissible, may be considered doubtful.[9] It is also doubtful whether the custom of maritime warfare permitting the capture and confiscation of unoffending private enemy property on enemy vessels applies to aërial warfare, or whether such property is exempt from seizure except for a purely military purpose, as in the case of warfare on land.[10]

444. **Rights of Balloonists and Aëronauts.** — Balloonists and others engaged in aërial warfare, at least if properly enrolled and uniformed, are entitled to all the rights and privileges of lawful combatants. If captured, they should be treated as prisoners of

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[7] According to the Declaration of London, Art. 24, "wireless telegraphy as also balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines" may be declared conditional contraband.

Neutral airships would appear to be subject to the rights of visit and search, and liable to capture for carriage of contraband, for attempts to enter a blockaded port, or for unneutral services. They are liable to the appropriate penalties prescribed in such cases.

[8] "Belligerents may prevent the emission of waves, even by a neutral subject, upon the high sea within the zone which corresponds to the sphere of action of their military operations." Art. 6 of the Regulations on Wireless Telegraphy adopted by the Institute of International Law in 1906. 21 *Annuaire*, 323.

[9] Total prohibition or abstention from such acts would be the preferable solution, as being more in accordance with the principles underlying the modern conception of neutral obligations. Cf. *infra*, § 445. The prohibition would not necessarily apply to private belligerent airships.

[10] Here again, the rules governing land warfare should be preferred. The practice of pillage or the taking of booty in maritime warfare is a mere historic survival with no real justification on military grounds. There seems to be no good reason for applying it to aërial warfare.

war;[11] if killed, sick, or wounded, they should be dealt with in accordance with the provisions of the Hague and Geneva Conventions.[12]

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For fuller Bibliographies, see Bonfils, Kausen, Meyer, etc.

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[11] These statements appear necessary in view of a disposition shown in some quarters to treat them as spies upon several occasions.

During the Franco-German War of 1870, Prince Bismarck threatened to treat balloonists crossing the German lines as spies. See 1 Guelle, 136.

Early in 1904 Admiral Alexieff also threatened to treat as spies correspondents on board neutral vessels "who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions," in case any such "should be arrested off Kwan-tung or within the zone of operations of the Russian fleet." This declaration, which was communicated to the Powers by the Russian Government, was provoked by the presence in the Gulf of Pe-chi-li and adjacent waters near Port Arthur of Mr. Fraser, a London *Times* war correspondent on board the Chinese dispatch boat *Haimun* equipped with wireless telegraphy apparatus. His dispatches were sent to a neutral station at the British port of Wei-hai-wei, whence they were transmitted to London.

On the case of the *Haimun*, see especially: Fraser, *A Modern Campaign* (1905); Hershey, 115 ff.; Lawrence, *War and Neutrality* (2nd ed.), 83 ff.; * 1 Rey, 368 ff.; *Int. Law Situations* (1907), 159 ff.

The Hague Regulations (Arts. 13 and 29) include "newspaper correspondents and reporters" among the army followers entitled to treatment of prisoners of war; and expressly exclude "individuals in balloons to deliver dispatches, etc." from the category of spies. See *supra*, p. 398 n.

[12] See *supra*, chs. 26 and 27, *passim*.

PART VI

THE LAW OF NEUTRALITY

CHAPTER XXIX

THE NATURE, HISTORICAL DEVELOPMENT, AND THE CHARACTERISTICS OR FUNDAMENTAL PRINCIPLES OF NEUTRALITY

445. **Definition and Nature of Neutrality.** — Neutrality has been well defined as "the condition of those States which in time of war take no part in the contest, but continue pacific intercourse with the belligerents."[1] It consists in the total abstention[2] from or absolute prohibition of certain acts (such as the sale of warships or the fitting and sending out of military expeditions[3] to aid either belligerent), as well as the observance of a strict impartiality in all cases where indirect assistance or support is still permissible (such as coaling or repair of belligerent warships in neutral ports). It also involves the acquiescence in or tolerance of certain acts (such as the exercise of the rights of visit and search) by the belligerents.

446. **Historical Development of Neutrality.** — The Law of Neutrality can scarcely be said to have existed in anything like its modern form prior to the close of the eighteenth century.[4]

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[1] Lawrence, *Principles* (4th ed.), p. 473. For various definitions of neutrality, see 4 Calvo, § 2491; and 8 P.-Fodéré, No. 3224.

[2] "Neutrality does not consist in the mere impartial treatment of opposing belligerents, but in the entire abstinence from any direct assistance of either party in his warfare." Walker, *Science*, etc., 374.

[3] In such cases a State is bound to use "due diligence" or the "means at its disposal" for the prevention of these acts.

[4] The very idea of neutrality as a principle of public law or conduct appears to have been almost unknown to the nations of Antiquity and the peoples of the Middle Ages, at least prior to the publication of the *Consolato del Mare* in 1494; though, as Westlake (II, 161) observes, "the fact of neutrality" must be as old as war itself.

The theory of neutral rights and obligations was formulated by Bynkershoek, Hübner, De Martens, and Vattel in the eighteenth century, but it was first put into actual practice by the United States during the Washington administration.[5]

Owing to the outrageous conduct of "Citizen" Genêt,[6] a newly appointed French minister who arrived in the United States in April, 1893, in fitting out privateers and otherwise violating American neutrality, Jefferson, then Secretary of State, asserted that it is "the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring Powers." [7]

Even Grotius devotes only one short chapter (lib. III, cap. 17) to those whom he calls *medii*. The gist of his impracticable doctrine is contained in a single sentence: "It is the duty of those who stand apart from a war to do nothing which may strengthen the side which has the worse cause or which may impede the motions of him who is carrying on a just war; and in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions, in not helping persons beseiged."

Bynkershoek (in 1737) called neutrals *non hostes*, though Nys (see 3 *Droit int.*, 559–560, and 2 *Études*, 59) has traced the use of the term *neutralité* back to French edicts and treaties belonging to the close of the fifteenth century. It appears that the first publicist to use the word "neutrality" was Neumayr de Ramsla in 1620.

In the seventeenth century some progress was made in the regulation of the exercise of the rights of visit and search, as also in the law governing captures for carriage of contraband and breach of blockade. But the territorial sovereignty of neutral waters was frequently violated, and it was still customary to permit the levy of troops on neutral soil.

The principle of territorial sovereignty was better respected in the eighteenth century; but it was still regarded as permissible for a State remaining neutral to furnish troops to a belligerent in accordance with a treaty obligation, and levies of troops on neutral soil apart from treaty stipulations were not severely condemned.

[5] The First Armed Neutrality formed by Russia in 1780 to resist the maritime pretensions of England was an important step in this direction, but its principles were soon violated even by Russia. *Cf. supra*, § 65.

[6] M. Genêt granted commissions to American citizens who fitted out privateers manned with Americans in American ports for the purpose of preying on British commerce. He also set up Prize Courts (in connection with French Consulates in the United States) which proceeded to try and condemn British vessels captured by French cruisers. When remonstrated with, Genêt's conduct was marked by extreme insolence.

For the story of Genêt's controversy with the Washington administration, see any good history of the United States. See especially 4 Moore, § 639; and Dana, note 215 to Wheaton, 536 ff.

[7] Jefferson to Genêt, June 5, 1793, 2 and 7 Moore's *Digest*, §§ 224 and 1295. In a communication to Mr. Morris, United States Minister to France, dated

Because of this experience and the acquittal of Gideon Henfield,[8] who had been indicted for cruising in one of the privateers commissioned by Genêt, Congress passed the first Neutrality Act of 1794 — a law which was strengthened in 1818 in consequence of violations of American neutrality during the Spanish-American wars of independence.[9] Similar so-called "Enlist-

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August 16, 1793, Jefferson thus stated the "principles of the Law of Nations" relating to the duties of neutral nations:

"That a neutral nation must, in all things relating to the war, observe an exact impartiality toward the parties; that favors to one to the prejudice of the other would impart a fraudulent neutrality, of which no nation would be the dupe; that no succor should be given to either unless stipulated by treaty, in men, arms, or anything else directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; and he who does may be rightfully and severely punished; that if the United States have a right to refuse the permission to arm vessels and raise men within their posts and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments." 7 Moore, § 1293, pp. 880–881.

[8] Wharton's *State Trials*, 49.

[9] Rev. St., §§ 5281–5291 (U. S. Comp. St., 1901, pp. 3599–3602).

The neutrality Act of 1818 was thus summarized in President Roosevelt's Neutrality Proclamation of Feb. 11, 1904:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent. (The phrase used throughout the Act is "any foreign prince, State, colony, district or people.")

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman, on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits of or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

"8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

"9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

"10. Increasing or augmenting, or procuring to be increased or augmented, ment" Acts were passed by the British Parliament in 1819 and 1870.[10]

447. **General Characteristics or Fundamental Principles of Neutrality.** — The following may be regarded as general characteristics or fundamental principles underlying or governing the positive rules of neutrality:

(1) War being "an abnormal or exceptional relation between States, the presumption, even in time of warfare, is always in favor of the laws of peace, and therefore of the rights and privileges of neutrals in their peaceful relations with each other and with belligerents."[11] "Unless proof to the contrary is shown, neutral States and their subjects are free to do in time of war between other States what they are free to do in time of universal peace."[12]

(2) An independent State has an inalienable right to remain neutral in a war, and a belligerent is bound to respect this neutrality, more particularly its territorial sovereignty. The belligerent has a corresponding right to insist that the neutral State observe and enforce its neutral obligations.[13]

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or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

"11. Beginning or setting on foot, or providing or preparing the means for, any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents."

Cited from *U. S. Foreign Relations* (1904), p. 32, by Wilson, § 173, pp. 389–390. *Cf.* summary of the Act by Dana, note 215 to Wheaton, 542 f.

[10] For the text of the British Foreign Enlistment Act of 1870, see 2 Oppenheim, App. I, pp. 483 ff., or 33 and 34 Vict. 90. For a convenient abridgment of those portions of the United States and British Acts which relate to the equipment of warships in neutral territory, see Scott, *Cases*, 692–695.

The British Act of 1870 goes at least one step farther than the American Neutrality Acts. It prohibits not only the commissioning, equipping, and dispatching, but also the building or construction of "any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State, at war with any friendly State."

[11] Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, 118.

[12] Lawrence, *Principles* (4th ed.), p. 588. For a remarkable exposition of this fundamental principle, see Decamp, *Le droit de la paix et de la guerre* (1898), and *Ibid.*, in 7 *R. D. I. P.* (1900), 629 ff. and 705.

[13] These principles are a corollary of sovereignty. It is customary, though not

(3) The characteristic attitude of neutrality is impartiality. This attitude finds expression in absolute prohibition or total abstinence from all warlike operations, or it takes the form of equality of treatment of both belligerents in the case of acts which do not amount to a direct participation in the war.[14]

(4) A considerable portion of the Law of Neutrality, more particularly that relating to the so-called rights of visit and search, and to captures for carriage of contraband and unneutral service, is the result of a compromise between the opposing interests of neutrals and belligerents.

(5) In the study of this subject, it is necessary to keep in mind the distinction between the Law of Neutrality as existing between States and this Law as applied between States and individuals. Some acts are permitted to the latter which are prohibited to the former. It is also necessary to distinguish between the duties of a belligerent State toward neutral States and those of a neutral State towards belligerent States.

(6) In view of the example set by the Hague Conference of 1907, we have found it most convenient to abandon the above distinctions as the basis of our classification, and to deal with the Neutral Rights and Duties in Land and Maritime War respectively in separate chapters.[15]

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strictly obligatory, for neutral States to issue Declarations of Neutrality soon after the outbreak of important wars. These vary greatly in detail and content. Some are very brief and general in their character. For examples of such declarations, see *U. S. Foreign Relations* (1898), 14–36.

[14] *Cf. supra*, § 445.

[15] The older distinctions between perfect and imperfect neutrality, voluntary and conventional neutrality, etc., have for the most part been abandoned by the more recent authorities. They may have some basis in facts or conditions, but none in law. The same may be said of such terms as "armed" and "benevolent" neutrality. On permanent neutrality, or *Neutralization*, see *supra*, § 109.

Hautefeuille, *Histoire des origines*, etc. (1858–1869), *passim;* 1 *Ibid.*, *Des droits et des deboirs des neutres* (1868), 160–166; * 1 Kleen, 1–70; * Lawrence, Pt. IV, ch. 1; 3 F. de Martens, § 130; * Moore, *American Diplomacy*, ch. 2; * *Ibid.*, 2 *Études*, 47–163; 2 Oppenheim, §§ 285–292; 3 Phillimore, §§ 161–226; 2 Rivier, 370–375; Schuyler, *American Diplomacy*, 367–403; Taylor, §§ 596–613; 2 Twiss, §§ 208–212; 2 Verraes, 9–16; Walker, *History*, 195–202; *Ibid.*, *Science*, etc., 374–387; 2 Westlake, 169–181.

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CHAPTER XXX

NEUTRAL RIGHTS AND DUTIES IN LAND WARFARE

1. THE RIGHTS AND DUTIES OF NEUTRAL POWERS

THE Hague Conference of 1907 adopted the following Convention respecting the " Rights and Duties of Neutral Powers and Persons in War on Land ":

448. **Inviolability of Neutral Territory.** — " The territory of neutral Powers is inviolable (Art. 1)."

" Belligerents are forbidden to move troops or convoys, either of munitions of war or of supplies, across the territory of a neutral Power (Art. 2)." [2]

449. **Enlistment and Levying of Troops.** — " Corps of combatants cannot be formed, nor recruiting offices opened, on the

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[1] 5 H. C. (1907), Art. 1. *Cf.* 13 H. C. (1907), 1. *See infra*, § 458. This article, which was adopted without discussion, embodies a fundamental principle of the Law of Neutrality always recognized in theory and, in modern times, nearly always observed in practice.

Japan was forced to violate this principle at the outbreak of the Russo-Japanese War by her attack on the Russian vessels at Chemulpo and her subsequent invasion of Korea and Manchuria. But the conditions were altogether anomalous. Korea was under the virtual protection of Japan, and Manchuria is a case of " double or ambiguous sovereignty." The maintenance of Korean independence and the securing of the Russian evacuation of Manchuria were among the ostensible objects of the war, and it was unavoidable that these regions should become theaters of military operations. The neutrality of China (outside of Manchuria) was secured through the acceptance by the Powers of the principles embodied in the Hay note of February 10, 1904. See Hershey, 70–73 and 246 ff.; and Lawrence, *War and Neutrality*, ch. 11.

Under very exceptional circumstances, a State might be forced to violate the territorial sovereignty of another as a means of self-preservation. In order to excuse such an act, one must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." Webster in the case of the *Caroline* (1841). *Cf. supra*, note on p. 145.

[2] 5 H. C., 2. It should be noted that this is a positive prohibition upon belligerents. For the corresponding obligation resting upon neutrals, see 5 H. C., 5, *infra*, § 449.

territory of a neutral Power, in the interest of the belligerents (Art. 4)." [3]

"A neutral Power ought not to allow on its territory any of the acts referred to in Articles 2 to 4.[4]

"It is not bound to punish acts in violation of neutrality unless such acts have been committed on its own territory (Art. 5)." [5]

"A neutral Power incurs no responsibility from the fact that individuals cross the frontier singly for the purpose of placing themselves at the service of one of the belligerents (Art. 6)." [6]

450. **The Export of Arms, etc.** — "A neutral Power is not bound to prevent the export or transit, on behalf of one or the other of the belligerents, of arms, munitions of war, or, generally, of anything which can be of use to an army or fleet (Art. 7)." [7]

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[3] 5 H. C., 4. (For Article 3, by which belligerents are forbidden to erect or use for military purposes wireless telegraphy stations or apparatus on neutral territory, see *supra*, § 440.)

Article 4 prohibits the enlistment or levying of troops on neutral territory. It does not forbid expressions of opinion or of sympathy, even through public meetings. Loans by neutral individuals to belligerents are not illegal, though loans by a neutral Government are inadmissible. See especially Benton on *The Spanish-American War*, 41–42, 59–60; Hershey on *The Russo-Japanese War*, 79–82, 84–87; and 7 Moore, *Digest*, §§ 1311–1313.

[4] *Cf.* 5 H. C., 2–4, *supra*, for the corresponding obligations upon belligerents referred to in the text.

[5] 5 H. C., 5. "A neutral State will, of course, not be expected to discharge the duties cast upon it by this article, and by Arts. 11–14 [*infra*, §§ 451–453] should it be unprovided with forces sufficient to enable it to do so." Holland, No. 125.

[6] 5 H. C., 6. But it does incur responsibility if it knowingly permits, or does not by the exercise of due diligence prevent, foreign enlistment within its own jurisdiction. "Belligerent subjects who go home to perform their military duties, do not fall within the scope of this doctrine." 2 Westlake, 181.

The British Foreign Enlistment Act of 1870 prohibits enlistment or the acceptance of any commission or engagement on the part of a British subject (without a license from His Majesty), whether such engagement takes place within or without His Majesty's dominions. But our own Neutrality Laws (see *supra*, p. 454 n. for summary) merely prohibit enlistment or the acceptance of a foreign commission within the territory or jurisdiction of the United States. They also prohibit any one from hiring any person to enlist or from hiring another to go beyond the jurisdiction of the United States with intent to be enlisted; but they do not prohibit one from merely leaving the country with intent to enlist (*U. S.* v. *Kazinski*, 2 Sprague, 7).

It would seem that both the American and British laws are somewhat in advance of the actual requirements of International Law. On *Illegal Enlistment*, see especially Hall (6th ed.), 592–594; Hershey, 82–83; *1 Kleen, 255–285; Lawrence (4th ed.), pp. 637–639; *Ibid.* (3d ed.), § 257; *7 Moore, *Digest*, § 1293; *2 Westlake, 181–184.

[7] Official protests by belligerent Governments against the right of neutral

"Every restrictive or prohibitive measure taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be applied impartially by it to the belligerents" (Art. 9).[8]

"The fact that a neutral Power repels, even by force, attacks on its neutrality, cannot be considered as a hostile act (Art. 10)."[9]

2. Internment of Belligerents and Care of Wounded in Neutral Territory

451. **Duty of Internment.** — "A Neutral Power which receives on its territory belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

"It may keep them in camps, and even confine them in fortresses or in places assigned for this purpose.[10]

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individuals to trade in contraband are heard during nearly every war. This view is also championed by a small band of publicists, notably by Hautefeuille, Phillimore, and Kleen. It is without sanction, either in theory or practice.

For a discussion of this question, with citations from Lawrence and Jefferson, see Hershey, *The Russo-Japanese War*, 183–187. For expressions of opinion on the part of American statesmen, see 7 Moore, *Digest*, §§ 1263 and 1308. For judicial opinions of the U. S. Supreme Court, see the cases of *The Commercen*, 1 Wheaton, 382 and Scott, 765; *The Peterhoff*, 5 Wallace, 28 and Scott, 760; and *The Santissima Trinidad*, 7 Wheaton, 340 and Scott, 701.

[8] 5 H. C., 9. Article 8 and part of Article 9 are here omitted as dealing with the subject of wireless telegraphy. See *supra*, § 440.

[9] 5 H. C., 10. The neutral is, of course, bound to prevent the commission of such acts, if possible.

Opinions differ as to whether the neutral State is freed from responsibility when a belligerent attacked on neutral territory elects to defend himself instead of appealing to the neutral Government for protection. In 1852, Louis Napoleon, acting as arbiter, held that the Portuguese Government was absolved from responsibility for the destruction of the American privateer *General Armstrong* in Portuguese waters "on the ground that the privateer did not demand protection from the Portuguese authorities at the time, but resisted by battle the unjust attack of the British vessels, instead of relying upon the neutral protection. This decision was not satisfactory to the United States, as they did not consider the fact on which it rested as established in proof. The principle of the decision must certainly be confined to cases where the vessel attacked has reason to believe that effectual protection can be seasonably effected by the neutral, and makes a fair choice to take the chances of the combat rather than to appeal to neutral protection." 2 Moore, *Digest*, § 210, citing Ex. Doc., 32d Cong., Senate, No. 24.

On the case of the *General Armstrong*, see 4 Calvo, § 2662; * Dana, note 268 to Wheaton, § 429; Hall (6th ed.), 620; Hershey, note on pp. 262–263; * Lawrence (3d ed.), § 260; * 2 Moore, *Int. Arbitrations*, 1071 ff.; 2 *Ibid.*, *Digest*, § 210; 1 Scott, 235–236; 2 Oppenheim, § 361; Snow, *Cases*, 396 ff.; 2 Westlake, 203; 2 Wharton, *Digest*, § 227.

[10] With one exception (Art. 13), the articles under this head formed part of the

"It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without permission (Art. 11)." [11]

452. **Treatment of Interned Troops.** — "In the absence of a special Convention, the neutral Power shall supply the interned with the food, clothing, and relief prescribed by humanity.

"At the conclusion of peace, the expenses caused by the internment shall be made good (Art. 12)." [12]

"A neutral Power which receives prisoners of war who have escaped shall leave them at liberty. If it allows them to remain on its territory, it may assign them a place of residence.

"The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power (Art. 13)." [13]

453. **Care of Sick and Wounded Belligerents.** — "A neutral Power may authorize the passage over its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case the neutral Power is bound to adopt such measures of safety and control as may be necessary for the purpose.

"Wounded or sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the opposite party, must be guarded by the neutral Power, so as to insure their not taking part again in the operations of war. The same duty shall devolve on the neutral Power with respect to wounded or sick of the other army who may be committed to its care (Art. 14)." [14]

Hague Regulations on Land Warfare adopted in 1899. In 1907 they were transferred to the Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land. *Cf.* also B. D., 53-56.

[11] 5 H. C. (1907), 11, and H. R. (1899), 57. "It will be noted that no duty is imposed upon the neutral to extend hospitality to belligerent fugitives." 1 Scott, 547.

"If a belligerent force even accompanied by prisoners, enters neutral territory in (proved) error, its immediate departure should be permitted." Holland, No. 131.

[12] 5 H. C., 12 and H. R. 58. "Each belligerent will be responsible for the expenses caused by the internment of its own troops, in the absence of any treaty provision to the contrary." Holland, No. 132.

[13] 5 H. C., 13. This article is wholly new.

[14] 5 H. C., 14 or H. R., 59. "The neutral Power, though it may do so, is not bound to allow such passage as is here mentioned. The privilege should be accorded impartially, if at all, nor should one belligerent be permitted to send his sick and

"The Geneva Convention applies to the sick and wounded interned in neutral territory. (Art. 15)."[15]

3. Neutral Persons

454. **Conditions under which a Neutral Individual cannot take Advantage of his Neutrality.** — "The nationals of a State which takes no part in the war are considered to be neutrals. (Art. 16)."[16]

"A neutral cannot take advantage of his neutrality:

"(*a*) If he commits hostile acts against a belligerent;

"(*b*) If he commits acts in favor of a belligerent, particularly if he voluntarily takes service in the ranks of the armed forces of one of the parties.

"In such cases, the neutral shall not be more severely treated by the belligerent against whom he has abandoned his neutrality than a national of the other belligerent State could be (treated) for the same act (Art. 17)."[17]

455. **Acts which are not to be considered Unneutral.** — "The following acts shall not be considered as committed in favor of

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wounded through the neutral territory without consent of the other belligerent, previously obtained.

"Under the second paragraph, wounded prisoners, brought into neutral territory by a belligerent, may not be carried through as prisoners to the territory of their captor, but must remain under neutral control as long as the war lasts, when they will be allowed to return to their own country." Holland, No. 134.

[15] 5 H. C., 15. *Cf.* H. R., 60 and B. D., 56. To these articles on *Internment*, it should perhaps be added that war material belonging to one of the belligerents brought into neutral territory, should, if admitted, be seized and detained until after the conclusion of peace, when it should be restored to its rightful owner. See especially 2 Oppenheim, § 341.

[16] 5 H. C., 16. "Neutral subjects taking part in hostilities on behalf of one belligerent, are liable to be treated by the other belligerent in every respect as if they were enemy subjects, and their own Government has no right to object to their being so treated.

"Neutral subjects resident in the territory of a belligerent are, equally with the other inhabitants of the country, liable to suffer in person and property through the events of the war; and their Governments acquire thereby no right to claim compensation on their behalf. Such compensation, if not awarded by the special provisions of a treaty, is given only as a matter of grace and favor. They are, for instance, liable to be removed from their homes or even to be banished from the country, on suspicion of misconduct towards an occupying army, or for reasons of strategic convenience." Holland, No. 136.

[17] 5 H. C., 17. "It was agreed at the Conference of 1907 that expressions of sympathy are not 'acts' within the meaning of clause (*b*)." Holland, No. 137.

one of the belligerents, within the meaning of Article 17, letter (*b*):

" (*a*) The furnishing of supplies or the making of loans to one of the belligerents, provided that the person thus furnishing or lending lives neither in the territory of the other party nor in territory occupied by him, and that the supplies do not come from these territories.

" (*b*) The rendering of services in matters of police, or of civil administration (Art. 18)." [18]

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[18] 5 H. C., 18. Articles 16–18 are the surviving remnants of a German draft of twelve articles originally intended to form Chapter V of the Regulations for the Laws of War on Land. These articles, which constituted the first chapter of the German draft, have not been accepted by Great Britain.

The main feature of the German proposals was the adoption of the principle of nationality instead of that of domicile as a test of status in belligerent territory. They provided, *e.g.* that military services should not be solicited from or required of neutral individuals during a war; that neutral Powers should engage to prevent their nationals from enlisting in the army of either belligerent; that no war taxes, *i.e.* specific requisitions or contributions for military purposes, should be demanded from neutral persons; that neutral property should not be injured or destroyed unless required by the exigencies of war, etc. For an English translation of the rejected German proposals, see De Bustamante, in 2 *A. J.* (1908), 109–110; or 1 Scott, 826–828.

The adoption of these proposals would have established "a *régime* highly favorable both to persons and property of neutrals in belligerent States. Great Britain having large colonies with populations drawn from many States, would have been considerably handicapped if she had never been able to avail herself of the service of immigrants freely offered, who, not having resided long enough to acquire British nationality, still remained technically subjects of a neutral Power. The British delegate strongly objected to the German proposals, and he was supported by the delegates of France, Russia, and Japan, who also declined to accept the favored position created for subjects of neutral Powers in neutral States." Higgins, 293–294.

These proposals were supported by Germany, Austria, Spain, Switzerland, and the United States.

The following wishes bearing on this subject were unanimously expressed by the Hague Conference of 1907:

"2. That, in case of war, the competent authorities, civil and military, should make it their special duty to insure and safeguard the maintenance of pacific relations, more particularly of a commercial and industrial nature, between the inhabitants of the belligerent States and neutral countries.

"3. That the Powers should regulate by special Conventions, the position as regards military charges, of foreigners residing without their territory." See Higgins, 69 and 85; and 2 Westlake, 285.

4. Neutral Property

456. **Railway Material.** — " Railway material coming from the territory of neutral Powers, whether belonging to those Powers or to companies or private persons, and recognizable as such, cannot be requisitioned or utilized by a belligerent, unless in the case of and to the extent required by absolute necessity. It shall be sent back, as soon as possible, to the country of its origin.

" The neutral Power may likewise, in case of necessity, retain and make use, to a corresponding extent, of railway material coming from the territory of the belligerent Power.

" Compensation shall be paid, on either side, in proportion to the material used, and the duration of its use (Art. 19). "[19]

457. **Neutral Property of other Kinds.** — " Property of neutrals of other kinds, found in territory which is the scene of hostilities, even though not placed by them at the disposal of the enemy, is liable to be taken possession of, or even destroyed, for strategic reasons, by either belligerent; but compensation must in this case be made, by the belligerent so acting, to the neutral owners for the loss they have sustained."[20]

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[19] 5 H. C., 19. *Cf.* H. R. (1899), 54, which it replaces. This article was the result of a compromise between the opposing views of France and Germany with reference to railway material coming from neutral countries like Belgium and Luxemburg. The Conference adopted a middle course. But "the terms used in this Article leave the neutral very much at the mercy of the belligerent as regards the requisition and use of railway material. Who is to be the judge of the necessity, and what is to be the meaning of 'as soon as possible'?" Higgins, 294. For a contrary view, see 2 Westlake, 118 and 285–286.

On the *Convention on Neutral Powers and Persons in Land Warfare* as a whole, see: 1 and 3 *Actes et doc. de la deux confér.*, 125–129, 131–164, and 33–88, 179–230, respectively; *De Bustamante, in 2 *A. J.* (1908), 95–120; *Higgins, 182–294; *Holland, 62–68; Lémonon, 409–467; *Parl. Papers,* Misc. Nos. 4 and 5 (1908), *passim;* *1 Scott, 541–555; 2 Westlake, 117–119, 284–287.

"This Convention affords, within modest limits, a starting point for future conferences, and a basis on which may be built further rules safeguarding neutral interests. It contains on the whole well-accepted principles which were ready for codification.

"All the Powers except China and Nicaragua [which have since adhered] have signed this Convention, but Great Britain has made reservations in regard to Articles 16, 17, and 18, and the Argentine Republic in regard to Article 18." Higgins, 294.

[20] Holland, No. 140. This paragraph, which is not a part of 5 H. C., may be regarded as a sort of corollary. In any event, it states a rule of International Law.

For select references on the Law of Neutrality as a whole, whether at sea or on land, see Bibliography at the end of the next chapter.

CHAPTER XXXI

NEUTRAL RIGHTS AND DUTIES IN MARITIME WARFARE

The Hague Conference of 1907 adopted the following Convention respecting the "Rights and Duties of Neutral Powers in Maritime War":

1. Prohibitions Upon Belligerents

458. **General Principles.** — "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute a breach of neutrality on the part of the Powers which (knowingly) tolerated them (Art. 1)."[1]

"All acts of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitute a violation of neutrality and are strictly forbidden (Art. 2)."[2]

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[1] 13 H. C. (1907), 1. *Cf.* 5 H. C., 1, *supra*, § 448. "If a violation of neutrality occurs, it is a neutral's duty to take steps to obtain redress, especially when the other belligerent is injuriously affected, but this is not definitely stated in the Convention." Higgins, 461.

[2] This principle has been generally recognized both in theory and practice for over a century, though it was occasionally violated in the nineteenth century. The United States was guilty of at least two such violations during the Civil War — the seizure of the *Florida* in Brazilian, and the *Chesapeake* in British waters; but in both these cases the acts were disavowed and ample apology and reparation made. If possible, prizes thus captured must be restored. It is unnecessary to multiply references on this point. The leading case is that of the *Anna* (5 C. Rob. 373), decided by Sir William Scott (later Lord Stowell).

The Japanese were guilty of a serious violation of this principle during the Russo-Japanese War. On the night of Aug. 11, 1904, the partially disarmed Russian torpedo boat destroyer *Ryeshitelni* was seized in and towed out of the Chinese harbor of Chefoo (where she had taken refuge) by two Japanese destroyers.

On the *Ryeshitelni Incident*, see *Hershey, 260–263; Higgins, 463; *Lawrence, *War and Neutrality*, 291–294; *Ibid.*, *Principles* (4th ed.), 229; 2 Oppenheim, 343; Smith and Sibley, 116 ff.; *Takahashi, 437–444; 2 Westlake, 210.

459. **Prizes captured in Neutral Waters.** — "When a ship has been captured in the territorial waters of a neutral Power, this Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

"If the prize is not within the jurisdiction of the neutral Power, the captor Government must, on the demand of that Power, release the prize with its officers and crew (Art. 3)."[3]

460. **Prize Courts in Neutral Territory.** — "A Prize Court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters (Art. 4)."[4]

461. **Neutral Territory as Base of Operations.** — "Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, particularly to erect wireless telegraph stations or any apparatus intended to serve as a means of communication with the belligerent forces on land or sea (Art. 5)."[5]

2. PROHIBITIONS UPON NEUTRAL POWERS

462. **Supply of War Materials, etc.** — "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden (Art. 6)."[6]

I cannot agree with Westlake that the Japanese did not exceed their rights on this occasion, and repeat that the conduct of Japan in this matter, "although altogether exceptional, constitutes a blot upon a record which was otherwise remarkably clean and spotless from the standpoint of International Law." Hershey, 263.

[3] 13 H. C., 3. *Cf.* 12 H. C., 3, which permits an appeal to the International Prize Court in case of "an enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim." This gives the neutral Power the alternative of a diplomatic demand or an appeal to the International Prize Court. See Higgins, 461–462.

[4] 13 H. C., 4. This rule requires no comment.

[5] 13 H. C., 5. *Cf.* 5 H. C., 3 (*a*), *supra*, § 440 of which this article is in part a repetition. A neutral Government is under the corresponding obligation to use due diligence, *i.e.* the means at its disposal, "not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of a renewal or augmentation of military supplies or arms, or the recruitment of men." Second Rule of the Treaty of Washington. See 7 Moore, § 1330.

[6] 13 H. C., 6. The continued sale and delivery by the United States Government to agents of the French Government of arms and munitions of war after the

" A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet (Art. 7)." [7]

463. **Fitting out or Arming of Ships on Neutral Territory.** — " A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted in whole or in part within the said jurisdiction to warlike use (Art. 8)." [8]

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outbreak of the Franco-German War of 1870 have been defended on the ground that the sales had begun prior to the opening of hostilities, but they cannot be justified. See 7 Moore, § 1309.

Germany appears to have evaded this rule during the Russo-Japanese War by permitting the sale and delivery to Japan of a number of vessels practically forming part of her Auxiliary Navy, though belonging to the North German Lloyd and German Hamburg American Steamship Companies. True it is that the sale of merchant vessels by neutral individuals to belligerents has been generally upheld in spite of the adaptability of many of these vessels to warlike purposes; but the fact that these vessels appear to have been auxiliary cruisers of the German navy puts a different face on the matter. "In view of the close and intimate relations which subsist between these companies and the German Government, the sale and delivery of such vessels would seem to be impossible without the consent or connivance of that Government, and it can hardly be contended that such consent or connivance could be given without a serious breach of neutral obligation." Hershey, *The Russo-Japanese War*, 110. For the facts and further discussion, see *Ibid.*, 91; Holland, in 37 *R. D. I.* (1905), 362 f.; Hyde, in 2 *A. J.* (1908), 511; 2 Oppenheim, § 321; and Takahashi, 485–489.

[7] 13 H. C., 7. *Cf.* 5 H. C., 7 which is couched in identical terms. See *supra,* § 450, for comment and references.

It should be noted that warships are not specifically mentioned in this article. Is this by way of exclusion or inclusion? This question appears to be unanswered. For a discussion, see note 8, *below.*

[8] 13 H. C., 8. This is substantially a repetition of the First Rule of the Treaty of Washington (1871), relating to the arbitration of the Alabama Claims. For the text of these rules, see 7 Moore, *Digest,* § 1330. As to their origin, see 1 Moore, *Int. Arbitrations,* 495 ff. It will be noted that the phrase *due diligence* used in the Treaty of Washington is replaced by *means at its disposal* in 13 H. C., 8. Whether this furnishes a more definite test with a clearer meaning remains to be seen.

It should also be noted that 13 H. C., 8 adopts the Anglo-American doctrine of intent, but it is the intent which determines the probable destination or use of the vessel rather than that of the owner or shipbuilder. The British Act of

3. Application of the Rule of Impartiality

464. **General Principles.** — "A neutral Power must apply impartially to the two belligerents the conditions, the restrictions, or prohibitions, issued by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes.

1870 goes further, and prohibits not only the actual commissioning, equipping, and dispatching, but also the building or equipping under contract of any "ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the naval or military service of any foreign State at war with any friendly State."

Is the export, sale, or delivery of a warship to a belligerent purchaser or destination ever permissible? American statesmen and jurists have always held that "there is nothing in our laws, or in the Law of Nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." Judge Story, in the *Santissima Trinidad* (1827), 7 Wheat. 283, and Scott, 701. *Cf. U. S.* v. *Quincy* (1832), 6 Peters, 445, and Scott, 706; and *U. S.* v. *The Meteor* (1866), Scott, 711. For a brief review of these cases, see 2 Westlake, 188–189. For a digest of leading American cases, see Dana, note 215 to Wheaton, pp. 543–547. For opinions of American statesmen and judges, see Moore, *Digest*, §§ 1295 ff. and 1307 ff.; and 3 Wharton, *Digest*, §§ 393 and 396.

But this view can scarcely be longer maintained in the face of the First Rule of the Treaty of Washington, now incorporated in 13 H. C., 8. As one of our leading American authorities, Dr. Freeman Snow, has well said: "In considering this question, it should be remembered that, by the introduction of steam as the motive power of ships, and of iron and steel as the material of their construction, the conditions of maritime warfare have been very radically changed. What might have been a reasonable rule as applied in the time of sailing ships might now in the age of swift ironclads, be intolerably oppressive. In the cases of *Santissima Trinidad*, *U. S.* v. *Quincy*, and the *Meteor*, the courts were dealing with small sailing vessels, which had been converted into privateers, the possession of which by one or the other belligerent Power made very little difference in the general result of the struggle; whereas, the possession of an iron-clad ship might well turn the scale one way or the other, as indeed it did in the war between Chile and Peru in 1880–1881. This great power of inflicting injury upon one of the belligerents, it is fair to say, ought not to be permitted to neutral citizens, and the neutral nation is alone in a position to restrain them.

"In view of these facts, it is believed that the doctrine set up by the United States Neutrality Act and the Federal Courts, that the 'intent' of the owner or shipbuilder is the criterion by which his guilt or innocence is to be judged, is wholly inadequate; it would not for a moment stand the test of due diligence as applied by the Geneva Tribunal." Snow, *Cases*, note on pp. 437–438. *Cf.* Scott, *Cases*, 720.

For a complete history of the "Alabama" cases and the Geneva Award of 1872, see U. S. *Diplomatic Correspondence* for the years 1863–1871; *Papers relating to the Treaty of Washington; Case of Great Britain* with Appendix; *Case of U. S.; Claims*

"Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports and roadsteads (Art. 9)."[9]

465. **Passage of Belligerent Warships through Territorial Waters.** — "The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents (Art. 10)."[10]

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of the U. S.; etc. For good abridgments of the proceedings of the Geneva Board, see 1 Moore, *Int. Arbitrations*, ch. 14, or 9 *Ibid.*, *Digest*, § 1330. For a good brief sketch, see Walker, *Science*, 458–502. For an excellent summary of the controversy from the British point of view, see Bernard, *The Neutrality of Great Britain during the American Civil War, passim.* For a summary from the American point of view, see Cushing, *Treaty of Washington.* See also Balch, *The Alabama Arbitration* (1900).

"In view of the unsatisfactory and inadequate character of the older body of doctrine, would it not be well to take a step or two even beyond the First Rule of the Treaty of Washington and broadly assert that a neutral State is bound to use due diligence (*i.e.* the means at its disposal) not only to prevent the fitting out, arming, or equipping within its jurisdiction and departure from its territory of any vessel intended for the use of either belligerent, but also the construction, sale, and exportation of any warship whatsoever for or to any other than a *bona fide* neutral purchaser? Nay, would it not be well to go still farther and insist that a neutral State is bound to use the means at its disposal to prevent the construction for, or sale to, a belligerent purchaser, or the exportation to a belligerent destination, of any vessel which is adapted or readily convertible to belligerent use?" Hershey, *The Russo-Japanese War*, 106. See *Ibid.*, pp. 106–109, for some arguments in favor of this position. See pp. 91 ff. for alleged violations of the rules governing this subject during the Russo-Japanese Conflict.

These rules are for the most part inadequately dealt with in works on International Law. Interesting discussions may be found in Hall (6th ed.), 606–612; Lawrence (3d ed.), 261–263; 1 Kleen, 285–388; and 2 Westlake, 184–198.

In the case of military expeditions, it should especially be noted that it is immaterial whether the various parts or elements of the expedition, such as ships, crews, or arms, are dispatched separately from the neutral territory or combined outside its limits. They are alike illegal. See especially the *Terceira* expedition of 1829 as reported in Hall (6th ed.), 603; Lawrence (4th ed.), § 231; or * 2 Westlake, 194–195; and the *Horsa*, in 7 Moore, *Digest*, pp. 911–912.

[9] 13 H. C., 9. "The right of a State to forbid in a general way access to its ports to the belligerents is not in question in Article 9, and follows from its right of issuing general regulations and prohibitions." Reply of M. Renault to Sir Ernest Satwow, cited by Higgins, 467.

During the Russo-Japanese War, the Scandinavian States closed certain of their ports to all belligerent warships (except in case of distress and for hospital ships). Lawrence, *War and Neutrality*, 133.

[10] 13 H. C., 10. "Admiral Sperry declared that the United States could not accept this Article by reason of political considerations implied in the question of passage through territorial waters." Hyde, in 2 *A. J.* (1908), 515.

466. **Neutral Pilots.** — "A neutral Power may allow belligerent warships to employ its licensed pilots (Art. 11)." [11]

467. **Duration of Sojourn of Belligerent Warships in Neutral Ports and Waters.** — "In default of special provision to the contrary in the legislation of a neutral Power, belligerent warships are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention (Art. 12)." [12]

The question of passage through straits which form international passageways was left open. Several Scandinavian delegates proposed the addition of the rule adopted by the Institute of Int. Law in 1894: "Straits which form a channel from one open sea to another can never be closed." "The question was discussed by the Examining Committee but no resolutions were passed on these points. From the opinions expressed there it appeared to be the general feeling that a neutral State could forbid even the innocent passage through parts of its territorial waters so far as it was necessary to maintain its neutrality, but that this prohibition could not extend to straits uniting two open seas. Article 10 leaves these questions unsettled, they remain '*sous l'empire du droit des gens général.*' All that it provides is that a State's neutrality is not compromised by the passage through its territorial waters of belligerent ships of war." Higgins, 468. For references and citations from Oppenheim, pp. 243–244, see *Ibid.*, note. *Cf. supra*, § 193.

[11] 13 H. C., 11. It is not bound to provide them. It is extremely doubtful whether this permission extends to the employment of official pilots on the Open Sea.

[12] 13 H. C., 12. *Cf.* Art. 27. This Article represents a distinct step backward. Though the rule limiting the stay of belligerent warships in neutral ports (except for special reasons) to twenty-four hours has never been officially accepted, *e.g.* by France, Germany, and Russia, it has been adopted by Great Britain, the United States, Japan, the Scandinavian countries, Brazil, Italy, Spain, China, etc., and it has been generally enforced during recent wars. The principle underlying the rule is that a belligerent armed vessel should not be permitted to remain in a neutral port longer than is absolutely necessary in order to procure innocent supplies or to effect repairs requisite for insuring seaworthiness.

An interesting German proposal supported by Russia was that the twenty-four hour rule should be obligatory in neutral ports and waters "situate in immediate proximity to the theater of war," but this was obviously impracticable.

"Article 12 makes no distinction between the belligerent war vessel which enters neutral waters simply *en route* to the theater of hostilities, and that which seeks refuge therein to escape capture. In the latter case, if special legislative provisions of the neutral so provided, a belligerent war vessel might, according to Article 12, be permitted to remain longer than twenty-four hours." Hyde, in 2 *A. J.* (1908), 517. This would violate a whole series of precedents set during the Russo-Japanese War.

On 13 H. C., 12, and the *24 Hours' Sojourn*, see especially: 17 *Annuaire* (for rule adopted by Institute of Int. Law), 285; * Benton (for the Spanish-American War), 185–187; * Hershey (for the Russo-Japanese War), ch. 7, *passim;* Higgins, 469–471; Hyde, in 2 *A. J.* (1908), 516–518; Lawrence, *Principles* (4th ed.), 639–640; * Lémonon, 574–578; 7 Moore, § 1315; 2 Oppenheim, § 333, pp. 355–356; 1 Scott, 633–636; * 2 Westlake, 208–210, 329; * *Int. Law Situations* (1908), 37–52.

"If a Power which has been informed of the outbreak of hostilities learns that a warship of a belligerent is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local law (Art. 13)." [13]

"A belligerent warship may not prolong its stay in a neutral port beyond the time permitted except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

"The regulations as to the length of time during which these vessels may remain in neutral ports, roadsteads, or waters do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes (Art. 14)." [14]

468. **Maximum Number of Belligerent Warships in Neutral Ports.** — "In default of special provisions to the contrary in the laws of a neutral Power, the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three (Art. 15)." [15]

469. **The Rule of Twenty-four Hours' Interval.** — "When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

"The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

"A belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary (Art. 16)." [16]

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[13] 13 H. C., 13. *Cf.* Art. 24, *infra*, § 474. On the case of the *Mandjur* (soon after the outbreak of Russo-Japanese War), see Hershey, 188–189; Higgins, 471; Lawrence, 137–139; and Takahashi, 418–429.

[14] 13 H. C., 14.

[15] 13 H. C., 15. This rule is wholly new. The number three was selected as corresponding to the number usually allowed in time of peace.

[16] 13 H. C., 16. It should be noted that this article omits the saving clause "in default of special provisions to the contrary" contained in the previous articles.

The rule of the twenty-four hours' interval dates from the middle of the eight-

470. **Repairs in Neutral Ports.** — "In neutral ports and roadsteads belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay (Art. 17)."[17]

471. **Augmentation of Armaments in Neutral Waters.** — "Belligerent warships may not make use of neutral ports, roadsteads, and territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews (Art. 18)."[18]

472. **Supply of Provisions and Fuel to Belligerent Warships in Neutral Ports.** — "Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

"Similarly these vessels may only take sufficient fuel to enable them to reach the nearest port in their own country. They may, however, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

"If, in accordance with the law of the neutral Power, the ships are only supplied with coal, twenty-four hours after their

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eenth century, whereas that of the twenty-four hours' sojourn was first introduced into international practice by Great Britain in 1862.

On the *24 Hours' Interval*, see especially: * Hall (6th ed.), 624–626; Higgins, 472–473; Lawrence (3d ed.), 509–510; 2 Oppenheim, § 347; and * 2 Westlake, 206–208.

[17] 13 H. C., 17. *Cf.* Arts. 13–15, *supra.* This is an admirable statement of the rule governing repairs of belligerent armed vessels in neutral ports, except that no repairs of injuries received in battle should be knowingly permitted by the neutral. At least this was the precedent set by President Roosevelt in the case of the three Russian cruisers interned at Manilla during the Russo-Japanese War. See Hershey, 209 f.

On *Repairs and Internment of Belligerent Warships in Neutral Ports*, see especially: 17 *Annuaire*, 285; Benton, 188–189; Donkier-Curtius, *Des navires de geurre dans les eaux neutres* (1907); Gaborit, ch. 2; Hall (6th ed.), 622–623; * Hershey, 204–210, 215; Higgins, 473–474; * Lawrence, *War and Neutrality*, (2nd ed.), 121; *Ibid.*, *Principles* (4th ed), 642; 7 Moore, §§ 1316–1317; 2 Oppenheim, §§ 346–347; * Takahashi, Pt. IV, ch. 1, pp. 417–458; 2 Westlake, 210–211; * *Int. Law Situations* (1905), 154–170; *Ibid.*, (1904), 63–78.

[18] 13 H. C., 18. *Cf.* 13 H. C., 5. Article 18 is in substance an enactment of the second part of the Second Rule of the Treaty of Washington (1871) into law. *Cf. supra*, § 463.

arrival, the permissible duration of their stay is extended by twenty-four hours (Art. 19)."[19]

"Belligerent warships which have taken fuel in a port belonging to a neutral Power may not replenish their supply in a port of the same Power within the succeeding three months (Art. 20)."[20]

473. **Prizes in Neutral Ports.** — "A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew (Art. 21)."[21]

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[19] 13 H. C., 19. The discussion of the question of fuel supply to belligerent warships in neutral ports was marked by divergent views. In accordance with her practice since 1862 — a practice followed by the United States, Japan, and some other countries — Great Britain urged that the quantity of coal should in no case exceed the amount necessary to enable the vessel to reach the nearest port of its own country or "some nearer named neutral destination." Japan and Spain supported this view. On the other hand, Germany, France, and Russia claimed that belligerent vessels should be permitted to take in a normal peace supply.

The result was a compromise which cannot be regarded as satisfactory. The supply of coal in any quantity in neutral waters to a modern battle fleet or warship engaged on an errand of destruction would seem to be a violation of the fundamental principles of neutrality. But the discussion of this question is usually colored by a sense of national interest. Thus, the main source of the Continental opposition to the limitation or prohibition of the supply of coal to belligerent warships in neutral ports lies in the fact that most of these States are poorly supplied with coaling stations as compared with Great Britain. But, whatever the motive, there can be no doubt that British practice in this matter approaches most nearly the ideal or theoretical requirements. The highest standard yet attained was set during the Russo-Japanese War by a proclamation issued by the Governor of Malta refusing hospitality to belligerent warships "proceeding to the seat of war" or proceeding to search for contraband. For the text of this interesting proclamation, see Hershey, 200.

On *Coaling in Neutral Ports*, see especially: 17 *Annuaire*, 273; Benton, 190–194; Bonfils (Fauchille), No. 1463; Hall (6th ed.), 600–602; *Hershey, ch. 7, *passim*, particularly pp. 198–203; *Higgins, 475–478; Hyde, in 2 *A. J.* (1908), 521–523; *Lawrence, *War and Neutrality* (2nd ed.), 120–137; *Ibid.*, *Principles*, (4th ed.), 642–646; *7 Moore, Digest, § 1305; 2 Oppenheim, §§ 333 (4), 346; *Pilidi, *La combustible en temps de guerre* (1909); *2 Westlake, 310–317, 330; **Int. Law Situations* (1906), 66–87; *Ibid.*, (1908), 79–97; *Ibid.*, (1910), 9–44.

[20] 13 H. C., 20. This has been the British practice since 1862.

[21] 13 H. C., 21. *Cf.* Art. 3, *supra*. Many States, *e.g.* Great Britain, Italy and Japan, prohibit belligerent warships from bringing their prizes into their ports when neutral except in case of distress. France, Spain, and Brazil adhere to

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21 (Art. 22)."[22]

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the crew are left at liberty (Art. 23)."[23]

474. **Internment of Belligerent Vessels in Neutral Ports and Detention of the Crew.** — "If, notwithstanding the notification of the neutral Power, a belligerent warship does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

"When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

"The officers and crew so detained may be left in the ship or kept either on another vessel or on land, and may be subjected to such measures of restriction as it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

"The officers may be left at liberty on giving their word not to quit the neutral territory without permission (Art. 24)."[24]

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the older twenty-four hour rule for the sojourn in their ports of such vessels with their prizes.

On *Prizes in Neutral Ports*, see especially: Hall (6th ed.), 614–615; *Higgins, 478–479; 3 Phillimore, § 379; * 2 Westlake, 214–215.

[22] 13 H. C., 22.

[23] 13 H. C., 23. The purpose of this article is, according to M. Renault, "to render rarer, or to prevent, the destruction of prizes." Whether this object will be attained remains to be seen. It is certainly highly objectionable on principle.

[24] 13 H. C., 24. *Cf.* 5 H. C., 11, par. 3. For references on *Internment of Belligerent Armed Vessels*, see *supra*, p. 472. The vessels are to be interned, the officers and crew detained. This treatment is analogous to that accorded to belligerent troops seeking refuge on neutral territory. *Cf. supra*, §§ 451–452.

475. **Measure of Due Diligence.** — "A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters (Art. 25)." [25]

476. **Further Provisions.** — "The exercise by a neutral Power of the rights laid down in the present Convention can never be considered as an unfriendly act by either belligerent who has accepted the Articles relating thereto (Art. 26)." [26]

"The Contracting Powers shall communicate to each other in due course all laws, ordinances, and other provisions regulating in their respective countries the status of belligerent warships in their ports and waters, by means of a communication addressed to the Government of the Netherlands and forwarded immediately by that Government to the other Contracting Powers (Art. 27)." [27]

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[25] 13 H. C., 25. This article embodies the principle of the Third Rule of the Treaty of Washington (1871): "A neutral Government is bound to exercise due diligence in its own ports and waters and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

[26] *Ibid.*, 26. This article requires no comment.

[27] *Ibid.*, 27. Art. 28 contains the usual stipulation that the "provisions of the present Convention are only applicable to the Contracting Powers and only if all the belligerents are parties to the Convention."

The force of this Convention is perhaps somewhat weakened by paragraph 7 of the *Preamble* which states that "these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except where experience has shown the necessity for such change for the protection of the rights of that Power." This might conceivably be used as a pretext or loophole for the evasion of neutral obligations.

Other paragraphs in the *Preamble* emphasize the "desirability" of "specific enactments regulating the consequences of the status of neutrality" by neutral Powers; the obligation of impartiality in the application of the rules adopted; and that "in cases not covered by the present Convention, account must be taken of the general principles of the Law of Nations."

The following States did not sign this Convention: the United States, China, Cuba, Spain, and Nicaragua: but the United States and Nicaragua have since given their adhesion.

The following States have made certain reservations: Germany in respect to Art. 11–13 and 20; Great Britain, Arts. 19 and 23; Japan, Arts. 19 and 23; Turkey, as regards the Bosphorus and Dardanelles; the United States (not stated in the Table of Ratifications published in 5 *A. J.* (1911), 769–770).

The Convention, as a whole, deserves praise for securing so much, but it has some glaring defects. Its greatest achievement is perhaps the successful incorporation of the substance of the Three Rules of the Treaty of Washington; its most striking defects are the failure to insist upon stricter rules limiting the sojourn

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of belligerent armed vessels in neutral ports and the supply of fuel to warships proceeding to the seat of hostilities, and the permission granted to neutral powers to admit prizes into their ports. "The rules laid down are nearly all accompanied by provisos enabling them to be excluded by a neutral strong enough and sufficiently interested to do so. The rights of neutrals are asserted, but their duties are not sufficiently emphasized." Higgins, 483.

38 ff.; Pillet, *Les lois actuelles de la guerre* (1907), chs. 11–12; 1 Rey, *La guerre russo-japonaise* (1911); Takahashi, *Int. Law applied to the Russo-Japanese War* (1908), Pt. IV; Vattel, liv. III, §§ 103–135; 2 Varreas, *Le lois de la guerre et la neutralité* (1906).

For more complete Bibliographies, see Bonfils, and Olivart.

CHAPTER XXXII

THE LAW OF BLOCKADE

477. **Rules of the London Naval Conference.** — The ten Maritime Powers[1] which sent delegates to the London Naval Conference of 1908–1909, signed a Declaration embodying the following rules respecting " Blockade in Time of War " as "corresponding in substance with the generally recognized principles of International Law."

478. **Blockade as an Operation of War.** — " A blockade must be limited to the ports and coasts belonging to or occupied by the enemy (Art. 1)."[2]

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[1] These were Great Britain (at whose invitation the Conference met), the United States, Russia, Germany, France, Italy, Japan, Austria-Hungary, Spain, and the Netherlands.

The expressed object was that of "laying down the generally recognized rules of International Law in accordance with Article 7 (see *infra*, § 527) of the Convention signed at the Hague on the 18th of October, 1907, for the establishment of an International Prize Court."

Whether all the Powers shall eventually ratify or adhere to the Declaration of London or not, its articles may be regarded as the most authoritative statement in existence of the Law of Nations on the subjects of which they treat.

[2] D. L. (*Declaration of London*), 1. *Cf. infra*, Art. 18. "Blockade is here regarded solely as an operation of war, and there is no intention of touching in any way on what is called *pacific blockade* (see *supra*, §§ 324 ff.). . . . Blockade, as an operation of war, can be directed by a belligerent only against his adversary." *Report* on the Declaration of London in Higgins, 572; or *Int. Law Topics* by the Naval War College (1909), 25 ff.

I have followed the text as given in Higgins, 542 ff.; Lémonon, 100 ff.; *Int. Law Topics* (1910); and Bentwich, *The Dec. of London* (1911), ch. 7. See also Cohen, *The Dec. of London* (1911).

Blockade has been well defined as "the blocking of the approach to the enemy coast or a part of it by men-of-war for the purpose of preventing ingress and egress of vessels of all nations." 2 Oppenheim, § 368.

With reference to their purpose war blockades are often spoken of as strategic or commercial, but these terms have no legal significance.

As an institute of maritime International Law, blockade dates from the sixteenth

479. **A Blockade must be Effective.** — "In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective — that is to say — it must be maintained by a force sufficient really to prevent access to the enemy coast (Art. 2)."[3]

"The question whether a blockade is effective is a question of fact (Art. 3)."[4]

480. **Effect of Bad Weather.** — "A blockade is not regarded as raised if the blockading forces are temporarily driven off by bad weather (Art. 4)."[5]

481. **Rule of Impartiality.** — "A blockade must be applied impartially to the ships of all nations (Art. 5)."[6]

"The commander of a blockading force may grant to a war-

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century and owes its origin to the Dutch, who appear to have made the first application of it as distinct from "siege" in 1630. On the *History of Blockade*, see especially: Fauchille, *De blocus maritime* (1882), 2–12; 1 Kleen, 542 ff.; * Söderquist, *Le blocus maritime* (1908), 7–119; and 2 Westlake, 221–226.

[3] D. L., 2. On the *Declaration of Paris*, see especially: Higgins, 1–4; and *supra*, § 73.

The phrase "really to prevent access" should not be taken too literally. It must mean "to make the attempt at access highly dangerous." This, at least, has been the universal practice. The abuse aimed at was that of so-called "paper" blockades of which the wars of the Napoleonic period furnish good illustrations.

[4] D. L., 3. This is essentially a question for judicial decision. The number of the vessels or their position is in itself immaterial. They need not be anchored or stationary, as has been claimed by some Continental authorities (*e.g.* Fauchille, Hautefeuille, Heffter, Kleen, Ortolan, etc.), but an effective blockade may be maintained by cruisers at a considerable distance from the blockaded port or coast. Under certain circumstances one cruiser may be sufficient. The leading judicial decisions on this point are those of Lord Stowell and Dr. Lustington in the *Betsy* (1798), 1 C. Rob. 93, and Scott, 798; the *Franciska* (1854), Spinks, 287. See also the decision of C. J. Fuller in the *Olinde Rodrigues* (1898), 174 U. S. 510, and Scott, 835; *cf.* the *Nancy* (1809), 1 Acton, 57, and Scott, 817. Most German writers appear to agree with this view, *e.g.* Bluntschli, Art. 829; Liszt, § 41, IV; and Perels, § 49.

[5] D. L., 4. "It is not sufficient that the blockade be established; it must be maintained. If it is raised it may be reëstablished, but then it will require the same formalities as though it were established for the first time. . . . Article 4 must be considered restrictive in the sense that bad weather is the only form of compulsion which can be alleged. If the blockading forces are withdrawn for any other reason, the blockade would be regarded as raised, and, in case it should be reëstablished, Articles 12 (last rule) and 13 would apply." *Report, op. cit.*, in Higgins, 574; or *Int. Law Topics*, 29.

[6] D. L., 5. In other words it must be universal. Unless it is thus universally and impartially applied, it need not be respected by neutrals. *Cf. The Rolla*, 6 Rob. 364; and the *Franciska* (1885), 10 Moore's P. C., and Scott, 804.

ship permission to enter, and subsequently to leave, a blockaded port (Art. 6)." [7]

482. **Circumstances of Distress.** — "In circumstances of distress, acknowledged by an authority of the blockading forces, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there (Art. 7)." [8]

483. **A Blockade must be Declared and Notified.** — "A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16 (Art. 8)." [9]

484. **Declaration of Blockade.** — "A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name. It specifies:

"(1) The date when the blockade begins.

"(2) The geographical limits of the coast blockaded.

"(3) The delay to be allowed to neutral vessels for coming out (Art. 9)." [10]

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[7] D. L., 6. This is a matter left to his judgment or discretion. If he permits entrance to neutral warships, it is a matter of courtesy. *Cf. Report, op. cit.*

[8] D. L., 7. Among circumstances of distress the *Report* mentions want of food or water and need of immediate repairs. If the fact or state of distress is acknowledged, entrance is a matter of right. She has also a right to leave subsequently, provided, etc. *Cf.* the *Hiawatha*, Blatchford's P. C., 15.

[9] D. L., 8. *Cf.* D. L., 9, 11, and 16. "Independently of the condition prescribed by the Declaration of Paris that it must be effective, a blockade, to be binding, must be *declared* and *notified*.

" . . . The *declaration* of blockade is the act of the competent authority (a Government or commander of a squadron) stating that a blockade is, or is about to be, established under conditions to be specified (Article 9). The *notification* is the fact of bringing the declaration of the blockade to the knowledge of the neutral Powers or of certain authorities (Article 11).

"These two things — declaration and notification — will in most cases be done previously to the enforcement of the rules of blockade, that is to say, to the real prohibition of passage. Nevertheless, as we shall see later, it is sometimes possible for passage to be forbidden by the very fact of the blockade which is brought to the knowledge of a vessel approaching a blockaded port by means of a *notification* which is *special*, whereas notification which has just been defined, and which is spoken of in Article 11, is of a general character." *Report*, in Higgins, 575. *Cf. Int. Law Topics*, 34-35.

[10] D. L., 9. *Cf.* Art. 8, *supra*, and 16 (2), *infra*, § 490.

"The declaration of blockade in most cases emanates from the belligerent Government itself. That Government may have left the commander of its naval forces the power to himself declare a blockade according to circumstances. There will not, perhaps, be as much reason as formerly to exercise this discretion, because of

"If the blockading Power, or the naval authority acting in its name, do not establish the blockade in conformity with the provisions which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative (Art. 10)."[11]

485. **Notification of Blockade.** — "A declaration of blockade is notified:

"(1) To the neutral Powers, by the blockading Power by means of a communication addressed to the Governments directly, or to their representatives accredited to it.

"(2) To the local authorities by the officer in command of the blockading force. As soon as possible these authorities will, on their part, inform the foreign consuls who exercise their functions in the port or on the coast blockaded (Art. 11)."[12]

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the ease and rapidity of communication. . . ." *Report, op cit. Cf.* 2 Oppenheim, § 375.

It is assumed that a neutral vessel will be allowed a *reasonable* time for departure, though no definite time is fixed. Fifteen days have usually been granted. Art. 43 of the United States Naval Code (1900–1904) allowed thirty days.

[11] D. L., 10. The *Report* furnishes the following comment on this article: "The aim of this article is to insure the observance of Article 9. Suppose the declaration of blockade contains statements which do not correspond with the actual facts; it states that the blockade began, or will begin, on such a day, whereas, in fact, it only began several days later. Its geographical limits are inaccurately given; they are wider than those within which the blockading forces are operating. What shall be the sanction? The nullity of the declaration of blockade, which means that it would have no effect. If then, in such a case, a neutral vessel is captured for breach of blockade, she can refer to the nullity of the declaration of blockade as a plea for the nullity of the capture; if her plea is rejected by the national tribunal, she can appeal to the International Court.

"To avoid misunderstandings, the significance of this provision must be noticed. The declaration states that the blockade begins on the 1st of February; in fact it does not begin until the 8th. It goes without saying that the declaration had no effect from the 1st to the 8th, because at that time there was no blockade at all; the declaration states a fact, but does not take the place of one. The rule goes further: the declaration shall not even have effect from the 8th onward; it is definitely void, and another must be made.

"There is no question here of cases where Article 9 has been disregarded in that no period for departure has been accorded to neutral vessels which are in the blockaded port. The sanction would not be the same. There is no reason to annul the declaration as regards neutral vessels wishing to enter the blockaded port. That requires a special sanction which is provided in Article 16, paragraph 2." Higgins, 576; or *Int. Law Topics*, 37–39.

[12] "A declaration of blockade is not valid unless notified. . . . Two notifications must be made:

486. **Extension or Reëstablishment of the Blockade.** — "The rules relative to the declaration and notification of blockade apply to cases where the limits of the blockade are extended, or where the blockade is reëstablished after having been raised (Art. 12)." [13]

487. **Voluntary Raising or Restriction of the Blockade.**—"The voluntary raising of a blockade, as also any restriction which may be introduced, must be notified in the manner prescribed by Article 11 (Art. 13)." [14]

"(1) The first is addressed to neutral Powers by the belligerent Power, which communicates it to the Governments themselves or to their representative accredited to it. The communications to the Governments will in most cases be made through the diplomatic agents. . . . It is the duty of the neutral Governments advised of a declaration of blockade to take the necessary measures to dispatch the news to the different parts of their territory, especially their ports.

"(2) The second notification is made by the commander of the blockading force to the local authorities. These must inform, as soon as possible, the foreign consuls residing at the blockaded places or on the blockaded coastline. These authorities would be responsible for the neglect of this obligation. Neutrals might suffer loss from the fact of not having been informed of the blockade in sufficient time." *Report*, in Higgins, 576–577.

Article 11 seems to be a happy compromise between the extreme French view and practice, which prescribed special notification to every neutral vessel approaching the line of blockade, and the more reasonable Anglo-American view, which held that notification was not always necessary, and that knowledge might be presumed in case the existence of the blockade was one of general notoriety.

The legality of unnotified *de facto* blockades was upheld by our Supreme Court as late as 1899 in the case of the *Adula*, 176 U. S. 361, and Scott, 826. Such views must now be abandoned.

[13] D. L., 12. "Suppose a blockade is extended beyond its original limits: as regards the new part, it is a new blockade, and, in consequence, the rules as to declaration and notification must be applied to it. The same is true in cases where a blockade is reëstablished after having been raised; the fact that a blockade has already existed in the same locality must not be taken into account." *Report*, in Higgins, 577.

[14] D. L., 13. *Cf.* Art. 11, *supra*. "Only it must be observed that the sanction could not be the same in the two cases. To insure the notification of the declaration of blockade there is a direct and adequate sanction: an unnotified blockade is not binding. In the case of the raising there can be no parallel to this. The public will really gain by the raising, even without being told of it officially. The blockading Power which did not notify the raising would expose itself to diplomatic remonstrance on the ground of the non-fulfillment of an international duty. This non-fulfillment will have more or less serious consequences, according to circumstances. Sometimes the raising of the blockade will really have become known at once, and official notification would add nothing to this effective publicity.

"It goes without saying that this relates only to the *voluntary* raising of a blockade; if the blockading force has been driven off by the arrival of enemy forces, it cannot be held bound to make known its defeat, which its adversary will undertake

488. **Knowledge a Condition of Liability for Breach of Blockade.** — "The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade (Art. 14)."[15]

489. **Presumptive Knowledge.** — "Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade made in sufficient time to the Power to which such port belongs (Art. 15)."[16]

490. **Special Notification Necessary in case of Total Lack of Knowledge.** — "If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log book, with entry of the day and hour, as also of the geographical position of the vessel at the time.

"A neutral vessel which leaves a blockaded port must be allowed to pass free if, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or if, in the declaration as notified, no period of delay has been indicated (Art. 16)."[17]

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to announce without delay. Instead of raising a blockade, a belligerent may confine himself to restricting it; he only blockades one port instead of two. As to the port which ceases to be included in the blockade, it is as if there had been a voluntary raising; consequently, the same rule applies." *Report*, cited above.

[15] D. L., 14. "For a vessel to be liable to capture for breach of a blockade, the first condition is that she must have had knowledge of the blockade. . . . Nevertheless, there are circumstances in which, even in the absence of proof of actual knowledge, knowledge may be presumed, the right of rebutting this presumption being reserved to the party concerned." *Report*, in Higgins, 578. *Cf.* Art. 15 and note 16, below.

[16] D. L., 15. "A vessel has left a neutral port subsequently to the notification of the blockade made to the Powers to which the port belongs. Was this notification made in sufficient time, that is to say, so as to reach the port in question, where it had to be published by the port authorities? That is a question of fact to be examined. If it is settled affirmatively, it is natural to suppose that the vessel was aware of the blockade at the time of her departure. This presumption is not absolute, however, and the right to adduce proof to the contrary is reserved. It is for the incriminated vessel to furnish it, by showing that circumstances existed which explain her ignorance." *Report, op. cit.*

The Anglo-American doctrine of presumptive or constructive knowledge is thus maintained, but its range is limited to cases where there has been actual notification. It does not support the doctrine of notoriety. The leading case is that of the *Neptunus* (1799), 2 Rob. 110, and Scott, 796.

[17] D. L., 16. *Cf.* Art. 8, *supra.* This special notification "may be made to the vessels of a convoyed fleet by a neutral warship through the commander of the con-

491. **Seizure restricted to Radius of Action.** — "The seizure of neutral vessels for violation of blockade may be made within the radius of action (*rayon action*) of the warships assigned to render the blockade effective (Art. 17)."[18]

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voy, who acknowledges receipt of it and takes the necessary measures to have the notification entered on the log book of each vessel. . . . The vessel is prevented from passing, and the blockade is thus made *binding* for her, though not *previously* notified; this adverb is therefore omitted in Article 8. It cannot be admitted that a merchant vessel should claim to disregard a real blockade, and to break it for the sole reason that she is not personally aware of it. But though she may be prevented from passing, she may only be captured when she tries to break blockade after receiving this notification. This special notification is seen to play a very small part, and must not be confused with the special notification absolutely required by the practice of certain navies [*e.g.* France].

"What has just been said refers to the vessel coming in from sea. The vessel leaving the blockaded port must also be considered. If a regular notification of the blockade has been made to the local authorities, Article 11, (2), the position is simple: the vessel knows or is presumed to know of the blockade, and is therefore liable to capture in case she has not observed the period for departure allowed by the blockading Power. But it may happen that no declaration has been notified to the local authorities, or that this declaration is silent respecting the period allowed for departure, in spite of the rule prescribed, Article 9 (3). The sanction of the blockading Power's offense is that the vessel must be allowed to pass free. It is a strong sanction, which corresponds exactly with the nature of the offense committed, and will be the best means of preventing its commission.

"It goes without saying that this provision only concerns vessels to which the period allowed for departure would have been of use — that is to say, neutral vessels which were in the port at the time when the blockade was established; it has absolutely nothing to do with vessels which are in the port after having broken blockade.

"The commander of the blockading squadron may always repair his omission or mistake, make a notification of the blockade to the local authorities, or complete that which he has already made.

"As is seen from these explanations, the most ordinary case is assumed — that in which the absence of notification implies negligence on the part of the commander of the blockading forces. It is clear that the situation is altogether changed if the commander has done all in his power to make the notification, but has been prevented from doing so by the ill will of the local authorities, who have intercepted all communications from outside. In that case he cannot be forced to let pass vessels which wish to leave and which, in the absence of the prescribed notification and of presumptive knowledge of the blockade, are in a position similar to that contemplated in Article 16, paragraph 1." *Report* in Higgins, 578–579; or *Int. Law Topics* (1909), 45–49.

[18] D. L., 17. "The other condition of the liability of a vessel to capture is that she should be found within the radius of action of the warship assigned to render the blockade effective; it is not enough that she should be on her way to the blockaded port.

"As to what constitutes the *radius of action*, an explanation has been given which has been universally accepted, and is reproduced here as furnishing the best commentary on the rule of Article 17:

"When a Government decides to undertake blockading operations against some part of the enemy coast, it assigns a certain number of warships to take part in the blockade, and intrusts the command of these to an officer whose duty it is to use them to make the blockade effective. The commander of the naval force thus formed distributes the ships placed at his disposal according to the configuration of the coast and the geographical position of the blockaded places, and gives each ship instructions as to the part which she has to play, and especially as to the zone intrusted to her surveillance. All of the zones of surveillance taken together, organized in such manner as to make the blockade effective, form the radius of action of the blockading forces.

"The radius of action so understood is closely connected with the effectiveness of the blockade, and also with the number of ships employed on it.

"Cases may occur in which a single ship will be enough to keep a blockade effective, — for instance, at the entrance of a port, or at the mouth of a river with a small estuary, — on condition that circumstances allow the blockading ship to stay near enough to the entrance. In that case the radius of action is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this it will then become necessary to add other ships. From this cause the radius of action becomes wider and more remote from the coast. It may therefore vary with circumstances, and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

"It does not seem possible to assign limits to the radius of action in definite and unvarying figures, any more than it is possible to fix beforehand and invariably the number of ships necessary to assure the effectiveness of any blockade. These points must be determined according to circumstances in each particular case of a blockade; it might perhaps be done at the time of making the declaration.

"It is evident that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defense. In the latter case there could be no question of applying a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

"The radius of action of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade, and is always limited by the condition of effectiveness, it will never reach distant seas upon which merchant vessels sail which are perhaps destined for the blockaded ports but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the radius of action joined to that of effectiveness, as we have tried to define it, that is to say, including the zone of operations of the blockading forces, allows the belligerent to exercise in an effective manner the right of blockade which he admittedly possesses, and, on the other hand, it saves neutrals from exposure to the inconvenience of blockade at a great distance, while it leaves them free to run the risks to which they knowingly expose themselves by approaching points to which access is forbidden by the belligerent." *Report*, in *Int. Law Situations*, 49–53, and Higgins, 579–581. See also *Parl. Blue Book*, Misc. No. 5 (1909), 255–256.

"To this statement the American delegation added 'that the nature of the area of operations varied with geographical conditions, the proximity of neutral ports, and the interests of neutral commerce, as well as with the force employed.'" Admiral Stockton, in 3 *A. J.* (1909), 604. See *Blue Book*, cited above, 256.

Art. 17 negatives the Anglo-American doctrine that a neutral vessel clearly destined for a blockaded port is liable to capture from the moment she leaves neutral waters.

492. **Neutral Ports or Coasts cannot be Blockaded.** — "The blockading forces must not bar access to neutral ports or coasts (Art. 18)." [19]

493. **Doctrine of Continuous Voyage not Applicable to Blockade.** — "Whatever may be the ulterior destination of a vessel or of her cargo, the evidence of violation of blockade is not sufficiently conclusive to authorize the seizure of the vessel if, at the time, she is on her way to a non-blockaded port (Art. 19)." [20]

494. **Restriction upon Capture to Pursuit during the Return Voyage.** — "A vessel which, in violation of blockade, has left a blockaded port or has attempted to enter the port is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected (Art. 20)." [21]

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[19] D. L., 18. *Cf.* Art. 1 which Art. 18 completes.

During our Civil War the *Peterhoff* (5 Wallace, 28), destined for Matamoras on the Mexican side of the Rio Grande, was released on the ground that trade with Mexico could not be prohibited. "It is a mooted question whether the mouth of a so-called international river may be the object of a blockade, in case not all the riparian States are belligerents. Thus when, in 1854, during the Crimean War, the allied fleets of Great Britain and France blockaded the mouth of the Danube, Bavaria and Würtemburg, which remained neutral, protested. When, in 1870, the French blockaded the whole of the German coast of the North Sea, they exempted the mouth of the river Ems, because it runs partly through Holland." 2 Oppenheim, § 373. *Cf.* 2 Westlake, 238–239.

It is generally held that straits forming international highways are not subject to blockade, even though both states are within enemy jurisdiction. Blockade of the Suez and Panama Canals is prohibited by treaty.

[20] D. L., 19. *Cf.* Arts. 30 and 35 for the application of the doctrine of "continuous voyage" to absolute contraband. Art. 19 denies the application of this doctrine to blockade. On this doctrine as applied by our courts to blockade during the Civil War, see the *Bermuda*, 3 Wallace, 514; the *Stephen Hart*, Blatch. P. C., 387, 3 Wallace, 559, and Scott, 852; and the *Springbok*, Blatch. P. C., 349, and 5 Wallace, 1.

"It is the real destination of the vessel which must be considered when a violation of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough to justify the capture, for violation of blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port." *Report*, in Higgins, 581; or *Int. Law Topics*, 55.

[21] D. L., 20. "A vessel has left the blockaded port or has tried to enter it. Shall she be indefinitely liable to capture? An absolutely affirmative reply would be too extreme. This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; and it would not suffice that she be encountered by a cruiser of the blockading squadron. The question whether or not the pursuit is

495. **Penalty for Breach of Blockade.** — "A vessel found guilty of violation of blockade is liable to condemnation. The cargo is also condemned, unless it is proven that at the time the goods were shipped the shipper neither knew nor could have known of the intention to violate the blockade (Art. 21)." [22]

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abandoned is a question of fact; it does not suffice that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait her departure, so that the pursuit is necessarily suspended, but not abandoned. Capture is no longer possible when the blockade has been raised." *Report*, in Higgins, 581–582.

The American Delegation accepted this article, under the reservation that "a pursuit is considered as continued and not abandoned within the meaning of the article, even if it is abandoned by one line of the blockading force to be resumed after an interval by a ship of the second line, until the limit of the area of the operations is reached. In certain conditions there might be several lines, each having its respective zone of pursuit." *Blue Book*, cited above, 256.

Art. 20 modifies the Anglo-American doctrine that a ship which has successfully run a blockade is liable to capture at any time during her return voyage. *Cf.* Art. 44 of the United States (Stockton's) Naval War Code. The leading case is that of the *General Hamilton*, 6 Rob. 610.

[22] D. L., 21. "The vessel is condemned in all cases. The cargo is also condemned in principle, but the interested party may oppose a plea of good faith, that is to say, he may prove that when the goods were shipped, the shipper did not know and could not have known of the intention to break the blockade." *Report*, in Higgins, 582.

This makes the condemnation of the cargo turn upon the question of actual or presumptive knowledge on the part of the shipper. This presumption of knowledge would be absolute in case he were also the owner of the vessel, at least according to Anglo-American practice. See the leading case of *The Panaghia Rhomba* (1858), 120 Moore's P. C., 168, and Scott, 800.

As late as the eighteenth century the crew of a blockade runner might be imprisoned or even put to death, but to-day they cannot even be made prisoners of war, though they may be detained as witnesses.

Though the rules on blockade laid down by the London Naval Conference are on the whole very adequate and satisfactory, there are of course some points which have been overlooked or omitted.

The most important omission is the failure to condemn blockade by submarine mines. Until recently it had always been assumed that the use of warships was necessary in order to constitute an effective blockade, though they might be supported by shore batteries. During our Civil War the harbor of Charleston was obstructed by means of old sunken vessels laden with stones (7 Moore, § 1286), and this has been deemed a permissible mode of warfare as auxiliary to blockade.

In recent discussions it has sometimes been assumed that in future wars attempts will be made to institute blockades by means of submarine mines. 8 H. C., 2 (see *supra*, § 431), forbids the "laying of automatic contact mines off the coasts and ports of the enemy, with the *sole* object of intercepting commercial navigation." Whether as a new and inhuman mode of warfare or as an unwarranted extension of the means of blockade, this method of interfering with neutral commerce should be absolutely prohibited. See especially: Bentwich, *War and Private Property*, 124; Lawrence, *International Problems*, etc., 189–192; *Ibid.*, *Principles* (4th ed.), 537–686; and 2 Westlake, 326.

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For Bibliographies, see Bonfils, De Boeck, Olivart, and Södersquist.

In case of insurrection, a Government cannot close ports in possession of the insurgents to neutrals by a mere declaration that they are no longer open to trade, though a State may of course exclude foreign as well as domestic trade from any of its harbors in which it actually exercises authority. For examples, see 7 Moore, § 1271.

There has been considerable opposition to purely commercial blockades, but the success of the great commercial blockade instituted by the United States against the Southern Confederacy during the Civil War went far to defeat this opposition. This view had official support even in the United States before the Civil War. For the argument of Secretary Cass (1859) against commercial blockades, see 7 Moore, § 1266, and 2 Westlake, 227.

"A blockade ceases:

"(*a*) On the conclusion of peace.

"(*b*) When the blockading vessels voluntarily withdraw.

"(*c*) When these vessels are driven away by the enemy, however short the time of absence.

"(*d*) When it ceases to be effective, except because of stress of weather.

"(*e*) When the blockading place comes into possession of the forces of the blockading belligerent." Wilson, § 197.

CHAPTER XXXIII

LAW OF CONTRABAND

496. **Definition.** — Contraband of war consist of "those articles which belligerents prohibit neutrals from carrying to their enemies, not in connection with a blockade, but because they are regarded as being objectionable in themselves, either generally or in the particular circumstances of the war."[1]

497. **List of Articles Absolute Contraband.** — The Declaration of London (1909) declared that "the following articles may, without notice,[2] be treated as contraband of war, under the name of absolute contraband:

"1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

"2. Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

"3. Powder and explosives specially adapted for use in war.

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[1] 2 Westlake, 240. The term is derived from the Latin *contra bannum* or *bandum*, meaning contrary to the ban or edict.

The history of the modern theory and practice of the prohibition of the carriage of contraband appears to date from the sixteenth and seventeenth centuries. For historical treatment of the subject, see especially: * Atherley-Jones, ch. 1; Bonfils (Fauchille), Nos. 1538–1564; 5 Calvo, §§ 2708 ff.; Hall, Pt. IV, ch. 5; 1 Kleen, 348–376; *Ibid., De la contrebande;* 7 Moore, *Digest*, ch. 26; 2 Twiss, §§ 121 ff.; 2 Westlake, 241 ff.

"The notion of contraband connotes two elements: it concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends: if they are destined for a neutral government, no; if destined for an enemy government, — yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by International Law." *Report* on the Declaration of London, in Higgins, 582; or in *Int. Law Topics* (1909), 58–59.

[2] "The words *de plein droit* (without notice) imply that the provision becomes operative by the mere fact of the war, and that no declaration of the belligerents is necessary. Trade is already warned in time of peace." *Report*, cited above.

"4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

"5. Clothing and equipment of a distinctively military character.

"6. All kinds of harness of a distinctively military character.

"7. Saddle, draught, and pack animals suitable for use in war.

"8. Articles of camp equipment, and their distinctive component parts.

"9. Armor plates.

"10. Warships and boats, and their distinctive component parts specially distinctive as being suitable only for use in vessels of war.

"11. Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms or of military material for use on land or sea (Art. 22)." [3]

498. **Notification in Case Articles are added to the List of Absolute Contraband.** — "Articles and materials exclusively used for war may be added to the list of absolute contraband by means of a notified declaration.

"The notification is addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the opening of hostilities is addressed only to neutral Powers (Art. 23)." [4]

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[3] D. L., 22. *Cf.* Art. 30, *infra*, § 503. "This list is that drawn up at the Second Peace Conference by the committee charged with the special study of the question of contraband. It was the result of mutual concessions, and it has not seemed wise to reopen discussion on this subject for the purpose either of cutting out or of adding articles." *Report, op. cit.* *Cf.* lists of contraband in Holland's *Manual*, Nos. 62 and 64; Stockton's *Naval War Code*, Art. 36; and the Japanese and Russian lists, in Hershey's *International Law and Diplomacy of the Russo-Japanese War*, 160–165.

Admiral Stockton, the leading American delegate, tells us that at least one half of the members of the London Conference were opposed to the inclusion of horses and mules in the list of absolute contraband. See 3 *A. J.* (1909), 605.

[4] D. L., 23. "Certain discoveries or inventions might make the list in Article 22 insufficient. An addition may be made to it on condition that it concerns articles *exclusively used for war.* This addition must be notified to the other Powers, which will take the measures necessary to make it known to their nationals. In theory, the notification may be made in time of peace or war. The former case will doubtless rarely occur, because a State which made such a notification might be suspected of meditating a war; it would, nevertheless, have the advantage of informing trade beforehand. There was no reason for excluding the possibility.

"Some have considered excessive the right given to a Power to make an addition to the list by a mere declaration. It should be noticed that this right does not present the dangers supposed. In the first place, it is understood that the decla-

499. **List of Articles Conditional Contraband.** — "The following articles and materials susceptible of use in war as well as for purposes of peace may, without notice, be treated as contraband of war, under the name of conditional contraband:

"1. Foodstuffs.

"2. Forage and grain suitable for feeding animals.

"3. Clothing and fabrics for clothing, boots, and shoes, suitable for military use.

"4. Gold and silver in coin or bullion, paper money.

"5. Vehicles of all kinds available for use in war, as also their component parts.

"6. Vessels, craft, and boats of all kinds, floating docks, as also their component parts.

"7. Fixed railway material or rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.

"8. Balloons and flying machines and their distinctive component parts, as also their accessories, articles and materials distinctive as intended for use in connection with balloons or flying machines.

"9. Fuel; lubricants.

"10. Powder and explosives not specially adapted for use in war.

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ration is only operative for the Power which makes it, in the sense that the article added will be contraband only for it, as a belligerent; other States may, of course, make a similar declaration. The addition may refer only to articles *exclusively used for war;* at present, it would be difficult to name any such not included in the list. The future is left free. If a Power should claim to add to the list of absolute contraband articles not exclusively used for war, it might draw upon itself diplomatic remonstrances, because it would be disregarding an accepted rule. Besides, there would be an eventual resort to the International Prize Court. Suppose that the Court holds that the article mentioned in the declaration of absolute contraband is wrongly placed there because it is not exclusively used for war, but that it might have been included in a declaration of conditional contraband. Condemnation would then be justified if the capture was made under the conditions laid down for this kind of contraband (Articles 33-35) which differ from those applicable to absolute contraband (Article 30).

"It had been suggested that, in the interest of neutral trade, a period should elapse between the notification and its application. But that would be injurious to the belligerent, who wishes precisely to protect himself, since, during that period the trade in articles which he considers dangerous would be free and the effect of his measures a failure. Account has been taken, in another form, of the considerations of equity which have been adduced (see Article 43)." *Report*, in *Int. Law Topics* (1909), 61–63; or Higgins, 583–584.

"11. Barbed wire, as also the implements for fixing and cutting the same.

"12. Horseshoes and horseshoeing materials.

"13. Harness and saddlery.

"14. Field glasses and telescopes, chronometers, and all kinds of nautical instruments (Art. 24)."[5]

500. **Notification in Case Articles are added to the List of Conditional Contraband.** — "Articles and material susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by means of a declaration which must be

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[5] D. L., 24. *Cf.* Art. 33. The *Report*, cited above, comments upon this Article as follows:

"The articles enumerated are only conditional contraband if they have the destination specified in Article 33.

"*Foodstuffs* include products necessary or useful for the sustenance of man, whether solid or liquid.

"*Paper money* includes only inconvertible paper money, *i.e.* banknotes, which may or may not be legal tender. Bills of exchange and checks are not included.

"Engines and boilers are included in the category of (6).

"Railway materials include fixed material (such as rails, sleepers, turntables, parts designed for the construction of bridges) and rolling stock (such as locomotives and cars)."

The so-called Anglo-American doctrine of conditional or occasional contraband has been strongly opposed by some Continental publicists, *e.g.* Hautefeuille, Ortolan, Kleen, etc.; but the majority of them concede the application of the principle in exceptional cases. It may be noted that the Institute of International Law attempted (in 1896) to abolish what it termed relative or accidental contraband, as applied to articles *ancipitus usus* (of dual or double use), and to limit contraband to a few categories. See 16 *Annuaire* (1896), 205.

For references and citations to leading Continental authorities opposed to the doctrine of conditional contraband, see especially: 5 Calvo, § 2709; Hall (6th ed.), note on pp. 649–650; Hershey, note on pp. 161–163; Lawrence, *Principles* (3d ed., § 278 or 4th ed., § 255).

The following are leading cases on conditional contraband: *The Jonge Margaretha* (1799), 1 C. Rob. 189, and Scott, 762; *The Commercen* (1816), 1 Wheaton, 382, and Scott, 765; and the *Peterhoff* (1866), 5 Wallace, 28, 58, or Scott, 760.

The Anglo-American doctrine of conditional contraband is based upon the Grotian division of commodities into three classes: (1) articles of direct and immediate use in war, such as arms and ammunition, which are always contraband when they have a belligerent destination; (2) things absolutely useless in warfare, such as household furniture, which are never contraband under any circumstances; and (3) *res ancipitus uses* — things of double or dual use, *i.e.* useful in peace as well as war, such as coal, horses, provisions, cloth, etc. These are contraband of circumstance, *i.e.* they are only to be treated as contraband under special circumstances, such as when destined to a place besieged, or when clearly intended for the direct use of the belligerent army or navy.

notified in the manner provided for in the second paragraph of Article 23 (Art. 25)."[6]

501. **Notification in Case a Power waives its Right to treat Articles as Contraband.** — "If a Power waives, so far as it is concerned, the right to treat as contraband of war articles and materials comprised in any of the classes enumerated in Articles 22 and 24, it shall make known its intention by a declaration notified in the manner provided for in the second paragraph of Article 23 (Art. 26)."[7]

502. **The Free List.** — "Articles and materials which are not susceptible of use in war are not to be declared contraband of war (Art. 27)."[8]

"The following articles may not be declared contraband of war:

"1. Raw cotton, wool, silk, jute, flax, hemp, and other raw materials for the textile industries, as also yarns of the same.

"2. Nuts and oil seeds; copra.

"3. Rubber, resins, gums, and lacs; hops.

"4. Raw hides, horns, bones, and ivory.

"5. Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

"6. Metallic ores.

"7. Earths, clays, lime, chalk, stone, marble, bricks, slates, and tiles.

"8. Chinaware and glass.

"9. Paper and materials prepared for its manufacture.

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[6] D. L., 25. *Cf.* Art. 23, *supra*, § 498.

[7] D. L., 26. *Cf.* Art. 23, *supra*, § 498. "A belligerent may not wish to use the right to treat as contraband of war the articles included in the above lists. It may suit him either to add to conditional contraband an article included in absolute contraband or to declare free, so far as he is concerned, the trade in some article included in one class or the other. It is desirable that he should make known his intention on this subject, and he will probably do so in order to have credit for the measure. If he does not do so, but confines himself to giving instructions to his cruisers, the vessels visited will be agreeably surprised if the visiting officer does not reproach them with carrying what they themselves consider contraband. Nothing prevents a Power from making such a declaration in time of peace. See what is said as regards Article 23." *Report, op. cit.*

[8] D. L., 27. *Cf.* Art. 28, *below.* "The existence of a so-called *free* list (Art. 28) makes this statement useful. . . . It might have been thought that articles not included in that list might at least be declared conditional contraband." *Report,* cited above.

"10. Soap, paint and colors, including articles exclusively used in their manufacture, and varnishes.

"11. Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

"12. Agricultural, mining, textile, and printing machinery.

"13. Precious and semiprecious stones, pearls, mother-of-pearl, and coral.

"14. Clocks and watches, other than chronometers.

"15. Fashion and fancy goods.

"16. Feathers of all kinds, hairs, and bristles.

"17. Articles of household furniture and decoration; office furniture and accessories (Art. 28)." [9]

"Neither may the following be treated as contraband of war:

"1. Articles and materials serving exclusively for the care of the sick and wounded. They may, nevertheless, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

"2. Articles and materials intended for the use of the vessel in which they are found, as also those for the use of her crew and passengers during the voyage (Art. 29)." [10]

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[9] D. L., 28. The *Report* furnishes the following comment upon this article:

"In order to lessen the inconveniences of war as regards neutral trade it has been thought useful to prepare this so-called *free list*, but this does not mean, as has been explained above, that all articles omitted might be declared contraband of war.

"The *ores* (6) are the products of mines from which metals are obtained.

"There was a demand that *dyestuffs* should be included in (10), but this seemed too general; for there are materials from which colors are produced, such as coal, but which also serve other uses. Products used only for making colors enjoy the exemption.

"'Articles de Paris,' the meaning of which is universally understood, come under (15).

"(16) refers to the hair of certain animals, such as pigs and wild boars.

"Carpets and mats are included in household furniture and ornaments (17)."

[10] D. L., 29. *Cf.* Art. 30, below.

"Motives of humanity have exempted articles and materials used exclusively to aid the sick and wounded, which naturally include drugs and different medicines. This does not refer to hospital ships, for which special immunity is provided by the Hague Convention of the 18th October, 1907, but to ordinary merchant vessels, whose cargo includes articles of the kind mentioned. . . . It must, however, be observed that the right of requisition may not be exercised in all cases. The articles in question must have the destination specified in Article 30, that is to say, an enemy destination. Otherwise, the ordinary law prevails; a belligerent could not have the right of requisition as regards neutral vessels on the high seas.

503. **Destination in Case of Absolute Contraband. Application of the Doctrine of "Continuous Voyage."** — "Absolute contraband is liable to capture if it is shown to be destined to the territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land (Art. 30)." [11]

"Articles and materials intended for the use of the vessel, which might in themselves and by their nature be contraband of war, may not be so treated, — as, for instance, arms intended for the defense of the vessel against pirates or for making signals. The same is true of articles intended for the use of the crew and passengers during the voyage; the crew here includes all persons in the service of the vessel in general." *Report*, cited above.

[11] D. L., 30. *Cf.* Art. 22. "As has been said, the second element in the notion of contraband is *destination*. Great difficulties have arisen on this subject, which are typified in the *theory of continuous voyage*, often attacked or invoked without a clear comprehension of its exact meaning. One must simply consider cases by themselves to see how they can be settled without unnecessary annoyance to neutrals and without sacrificing the legitimate rights of belligerents." *Report*, in Higgins, 586; or *Int. Law Topics*, 73.

A "continuous voyage" was thus defined by the British Government in a memorandum drawn up for the use of the London Naval Conference:

"When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of 'continuous voyage' consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere." *Parl. Blue Book*, Misc., No. 4 (1909), 7–8.

"The articles included in the list in Article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a similar final destination can be shown by the captor. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, that suffices to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is thus established by Article 30. The journey made by the goods is regarded as a whole." *Report*, *op. cit.*

The doctrine of "continuous voyage" was first applied by England to neutral vessels engaged in the colonial trade — a trade prohibited to them in times of peace — of countries at war with Great Britain in violation of the so-called Rule of 1756. See the leading cases of the *William* (1806), 5 C. Rob. 385, and Scott, 848; and the *Immanuel* (1799), 2 C. Rob. 186, and Scott, 845.

France appears to have made the first application of this doctrine to contraband during the Crimean War in 1855. See 4 and 5 Calvo, §§ 1962, 2767. But it was

504. **Proof of Destination in Case of Absolute Contraband.** — " Proof of the destination specified in Article 30 is complete in the following cases:

" (1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

" (2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or to join his armed forces, before arriving at the neutral port for which the goods are documented (Art. 31)." [12]

first applied on a large and greatly extended scale by the United States during the Civil War. Our courts applied the doctrine to blockade as well as to contraband and condemned cargoes consigned to Nassau and other West Indian ports or to Matamoras, Mexico, on the ground that they were to be transshipped to blockade runners or sent overland for the use of the Confederacy. The leading cases are those of the *Bermuda* (1865), 3 Wallace, 514; the *Peterhoff* (1866), 5 Wallace, 28, and Scott, 760; the *Springbok* (1866), 5 Wallace 1; and the *Stephen Hart* (1863), Blatch. P. C., 387, and Scott, 852. The decision of Justice Betts in the latter case was affirmed by the United States Supreme Court (1865), 3 Wallace, 559. See also 7 Moore, *Digest*, §§ 1256 ff.

These decisions were severely criticised by leading British and Continental jurists, *e.g.* by Bernard, Hall, Twiss, Bluntschli, Bonfils, Fiore, Fauchille, Kleen, and many others. It may be admitted that some of the *dicta* of the judges and perhaps some of the decisions were open to criticism, but they were never officially questioned by the British Government, which assumed a similar position during the Anglo-Boer War in 1900 in the case of the *Bundesrath*, *Herzog*, and the *General*, German vessels seized by British cruisers on suspicion of carrying contraband from German ports to the Portuguese port of Lorenzo Marques in Delogoa Bay. For the correspondence between England and Germany, see *Parl. Blue Book*, Africa No. 1 (1900), 1. *Cf.* 7 Moore, § 1262.

A similar position was taken by Italy in the case of the *Doelwijk* (1896). For discussion and references on this case, see Elliot, in 1 *A. J.* (1907), 97–99 and note on p. 99.

The London Naval Conference of 1909 effected a happy compromise of this much-controverted question by sanctioning the application of the doctrine of "continuous voyage" to absolute contraband, but denying its applicability to conditional contraband and blockade.

On the doctrine of *Continuous Voyage*, see especially (beyond the ordinary treatises): 15 *Annuaire* (1896); Atherley-Jones, ch. 3; * Baty, *Int. Law in South Africa*, ch. 1; * Elliot, in 1 *A. J.* (1907), 61–104; Fauchille, in 4 *R. D. I. P.* (1897), 297 ff.; Gregory, in *Harvard Law Review* (1901); Hart, in 17 *Law Quar. Rev.* (1901); *Int. Law Topics* (1905), 77–106; Remy, *Théorie de la continuité du voyage* (1902); Westlake, in 15 *L. Q. R.* (1899), 23–30; White, in 17 *L. Q. R.* (1901).

[12] D. L., 31. *Cf.* Art. 30, *supra*. The *Report* comments upon this Article as follows:

"As has been said, it is upon the captor that the obligation falls of proving that the contraband goods really have the destination specified in Article 30. In certain cases specified in Article 31 proof of the destination is *conclusive*, that is to say, proof to the contrary is not admitted.

"The ship's papers are conclusive proof of the voyage of a vessel carrying absolute contraband, unless the vessel is encountered having manifestly deviated from the route which she ought to follow according to her papers and is unable to justify such deviation by adequate reasons (Art. 32)."[13]

505. **Liability and Destination in Case of Conditional Contraband.** — "Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the articles cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24, (4) (Art. 33)."[14]

"*First Case.* — The goods are *documented* for discharge in an enemy port, that is to say, according to the ship's papers referring to those goods, they are to be discharged there. There is then a real admission, on the part of the interested parties themselves, of enemy destination.

"*Second Case.* — The vessel is to touch only at enemy ports; or she is to touch at an enemy port before arriving at the neutral port for which the goods are documented. Thus these goods, according to the ship's papers referring to them, are to be discharged in a neutral port, but the vessel which carries them is to touch at an enemy port before arriving at that neutral port. The goods will be liable to capture, and the possibility of proving that their neutral destination is real and in accordance with the intention of the parties interested is not admitted. The fact that, before reaching that destination, the vessel will touch at an enemy port, would occasion too great risk for the belligerent whose cruiser visits the vessel. Even without supposing a premeditated fraud, there might be a strong temptation for the master of the merchant vessel to discharge the contraband, for which he would obtain a good price, or there might be a temptation for the local authorities to requisition the goods.

"The same case arises where the vessel is to join the armed forces of the enemy before arriving at the neutral port.

"For the sake of simplicity, the provision speaks only of an *enemy port;* it is understood that a *port occupied by the enemy* must be regarded as an enemy port, as follows from the general rule in Article 30."

[13] D. L., 32. *Cf.* Art. 35, *infra*, § 507. "The papers, therefore, are conclusive proof of the voyage of the vessel unless she is encountered under circumstances which show that their statements are not to be trusted. See also the explanation given as regards Article 35." *Report*, cited above.

[14] D. L., 33. *Cf.* Arts. 30–32 for absolute contraband.

"The rules concerning conditional contraband differ from those laid down for absolute contraband in two respects: (1) there is no question of destination for the enemy in general, but of destination for the use of his armed forces or government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first, and Article 35 to the second principle.

"The articles included in the list of conditional contraband may serve for peace-

506. **Presumption of Destination in Case of Conditional Contraband.** — " The destination referred to in Article 33 is presumed to exist if the consignment is addressed to enemy authorities, or to a trader (*commerçant*) established in the enemy country when it is well known that this trader supplies articles and material of this kind to the enemy. The presumption is the same if the consignment is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy. This presumption, however, does not apply to the merchant vessel herself bound for one of these places if it sought to prove the contraband character of the vessel.

" Failing the above presumption, the destination is presumed innocent.

" The presumptions set up in this Article admit proof to the contrary (Art. 34)." [15]

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ful uses as well as for hostile purposes. If, from the circumstances, the peaceful purpose is certain, their capture is not justified; it is otherwise if a hostile purpose is to be assumed, which happens, for instance, in the case of foodstuffs destined for an enemy army or fleet, or of coal destined for an enemy fleet. In such a case there is clearly no doubt. But what is the decision when the articles are destined for the civil authorities of the enemy State? It may be money sent to a civil authority for use in the payment of official salaries, or rails sent to a department of public works. In these cases there is *enemy destination* rendering the goods liable in the first place to capture, and subsequently to condemnation. . . .

"It is the *authorities of the State* which are dependent on the central power that are in question, and not all the authorities which may exist in the enemy State; local and municipal authorities, for instance, are not included, and what is destined for their use would not be contraband.

"War may be waged under circumstances such that the destination for the use of a civil authority cannot be questioned, and consequently cannot make the goods contraband. For instance, there is a war in Europe, and the colonies of the belligerent countries are not, in fact, affected by it. Foodstuffs or other articles in the list of conditional contraband destined for the use of a civil colonial administration would not be regarded as contraband of war, because the considerations adduced above do not apply in this case; the resources of the civil government could not be drawn on for the needs of the war. Gold, silver, or paper money are exceptions, because a sum of money can easily be sent from one end of the world to the other." *Report*, *op. cit.*, in *Int. Law Topics* (1908), 79–81; or Higgins, 587–588.

[15] D. L., 34. *Cf.* Art. 33, *supra.*

"Ordinarily, contraband articles will not be directly addressed to the military or to the administrative authorities of the enemy State. Their true destination will be more or less concealed, and the captor must prove it in order to justify the capture. But it has been thought reasonable to set up presumptions based on the nature of the person to whom, or place for which, the articles are destined. It may be an enemy authority or a trader established in an enemy country who, as a matter of common knowledge, supplies the enemy Government with articles of

507. **The Doctrine of "Continuous Voyage" not Applicable to Conditional Contraband.** — "Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port.

"The ship's papers are conclusive proof of the voyage of the vessel as also of the port of discharge of the goods, unless the vessel is encountered having manifestly deviated from the route which she ought to follow according to her papers and is unable to justify such deviation by adequate reasons (Art. 35)." [16]

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the kind in question. It may be a fortified place of the enemy or a place serving as a base, whether of operations or supply, for the armed forces of the enemy.

"This general presumption may not be applied to the merchant vessel herself which is bound for a fortified place, except on condition that her destination for the use of the armed forces or authorities of the enemy State is directly proved, though she may in herself be conditional contraband.

"In the absence of the above presumption, the destination is presumed to be innocent. This is the ordinary law according to which the captor must prove the illicit character of the goods which he claims to capture.

"Finally, all the presumptions thus set up in the interest of the captor or against him admit proof to the contrary. The national tribunals, in the first place, and, in the second, the International Court, will exercise their judgment." *Report, op. cit.* *Cf.* Bentwich, *The Dec. of London*, 70–74.

[16] D. L., 35. "As has been said above, the doctrine of continuous voyage is excluded for conditional contraband, which is only liable to capture if it is to be discharged in an enemy port. As soon as the goods are documented for discharge in a neutral port they cannot be contraband, and no examination will be made as to whether they are to be forwarded to the enemy by sea or by land from that neutral port. This is the essential difference from absolute contraband.

"The ship's papers furnish conclusive proof as to the voyage of the vessel and as to the place of discharge of the cargo; it would be otherwise if the vessel were encountered having manifestly deviated from the route which she should follow according to her papers, and unable to give adequate reasons to justify such deviation.

"This rule as to the proof furnished by the ship's papers aims to prevent claims lightly raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea having manifestly deviated from the route which she ought to have followed, and unable to justify such deviation. The ship's papers are then contradicted by the actual facts and lose all value as evidence; the cruiser will be free to decide according to the case. In the same way, the visit and search of a vessel may reveal facts which irrefutably prove that the destination of the vessel or the place of discharge of the goods is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and captures or does not capture the vessel according to his judgment. To resume, the ship's papers are proof, unless the

508. **Exception in the Case the Enemy Territory has no Seaboard.** — " Notwithstanding the provisions of Article 35, if the territory of the enemy has no seaboard, conditional contraband is liable to capture if it is shown that it has the destination referred to in Article 33 (Art. 36)." [17]

509. **Place of Liability to Capture.** — " A vessel carrying articles liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole course of her voyage, even if she has the intention of touching at a port of call before reaching the hostile destination (Art. 37)." [18]

" A capture may not be made on the ground of a previous carriage of contraband which is now at an end (Art. 38)." [19]

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facts show their evidence to be false. This limitation on the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has not been to weaken the force of the general rule, which forms a safeguard for neutral trade.

"Because a single entry is shown to be false, it does not follow that the force of the ship's papers as evidence is nullified as a whole. The entries against which no allegation of fraud can be proved retain this value." *Report*, cited above.

[17] D. L., 36. *Cf.* Art. 33, *supra.* "The case contemplated is certainly rare but has nevertheless arisen in recent wars. In the case of absolute contraband, there is no difficulty, since destination for the enemy may always be proved, whatever the route which the goods are to follow (Article 30). For conditional contraband the case is different, and an exception must be made to the general rule laid down in Article 35, paragraph 1, so as to allow the captor to prove that the suspected goods really have the special destination referred to in Article 33 without the possibility of being confronted by the objection that they were to be discharged in a neutral port." *Report*, etc.

This Article is designed to meet such cases as arose during the Anglo-Boer War. See *supra*, p. 496 n. on the *Bundesrath*, etc.

[18] D. L., 37. "The vessel may be captured because of contraband during the whole of her voyage, provided that she is in waters where an act of war is lawful. The fact that she intends to touch at a port of call before reaching the enemy destination does not prevent capture, since in that case the enemy destination is proved in conformity with the rules laid down in Articles 30 to 32 for absolute contraband, and in Articles 33 to 35 for conditional contraband, and subject to the exception of Article 36." *Report*, in Higgins, 590; or *Int. Law Topics*, 89.

[19] D. L., 38. "A vessel is liable to capture when it is carrying contraband, but not for having carried contraband," *i.e.* she is not liable on the return voyage or for a previous offense. As Lord Stowell said in the leading case of the *Imina* (3 Rob. 138, and Scott, 776): "The articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port." (The latter part of this dictum is not literally true or is subject to exceptions.) For a violation of this rule by Russia in the case of the *Allanton*, see Hershey, 171–172; and Lawrence, *War and Neutrality* (2nd ed.), 221–247.

510. **Penalty for Carriage of Contraband.** — "Contraband goods are liable to condemnation (Art. 39)." [20]

"The confiscation of the vessel carrying contraband is allowed, if the contraband forms, reckoned either by value, by weight, by volume, or by freight, more than half the cargo (Art. 40)." [21]

"If a vessel carrying contraband is released, the expenses incurred by the captor in the trial before the national prize court, as also for the custody of the ship and cargo during the proceedings, are to be borne by the ship (Art. 41)." [22]

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[20] D. L., 39. This Article "presents no difficulty."

[21] D. L., 40. "It was universally admitted, however, that in certain cases the condemnation of the contraband does not suffice, and that the vessel herself should be condemned, but opinions differ as to the determination of these cases. It was decided to fix upon a certain proportion between the contraband and the total cargo.

"But the question divides itself: (1) What shall be the proportion? The solution adopted holds the mean between those proposed, which varied from a quarter to three quarters. (2) How should this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also encourages practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of weight or volume is adopted, the master will ship innocent goods sufficiently bulky or weighty in order that the volume or weight of the contraband may be less. A similar remark may be made as regards the value or the freight. The consequence is that, in order to justify condemnation, it suffices that the contraband should form more than half the cargo according to any one of the points of view indicated. This may seem severe; but, on the one hand, any other system would make fraudulent calculations easy, and on the other, it may be said that the condemnation of the vessel is justified when the carriage of contraband formed an important part of her venture — a statement which applies to all the cases specified." *Report, op. cit.*

In the Middle Ages, the vessel as well as the entire cargo were liable to be confiscated. Later (during the seventeenth and eighteenth centuries) it became customary only to exempt the vessel and the innocent part of the cargo. The Anglo-American practice has been to confiscate the vessel when the owner of the contraband was also the owner of the vessel, or in case of guilty knowledge on the part of the latter, or if the ship offered resistance or sailed with false or simulated papers; and also to confiscate such part of the innocent cargo as belonged to the owner of the vessel. See Holland's *Manual* (1888), Nos. 80–87. The leading cases are the *Jonge Tobias* (1799), 1 C. Rob. 329; the *Neutralitact* (1801), 3 C. Rob. 295, and Scott, 767; *Carrington* v. *Ins. Co.* (1834), 8 Peters, 495, and Scott, 769.

The rules adopted by the London Naval Conference are more in accordance with Continental practice.

[22] D. L., 41. "It is not just that on one hand, the carriage of more than a certain proportion of contraband should involve the condemnation of the vessel, while if the contraband forms less than this proportion, it alone is confiscated. This often involves no loss for the master, the freight of this contraband having

"Goods which belong to the owner of the contraband and which are on board the same vessel are liable to condemnation (Art. 42)."[23]

511. **Effect of Ignorance.** — "If a vessel is encountered at sea making a voyage in ignorance of hostilities or of the declaration of contraband affecting her cargo, the contraband cannot be condemned except on payment of indemnity; the vessel herself and the remainder of the cargo are exempt from condemnation and from the expenses referred to in Article 41. The same rule applies if the master, becoming aware of the opening of hostilities or of the declaration of contraband, has not yet been able to discharge the contraband.

"A vessel is deemed to be aware of the state of war or of the declaration of contraband if she left a neutral port after the notification of the opening of hostilities or the declaration of contraband made in sufficient time to the Power to which such port belongs. A vessel is also deemed to be aware of a state of war if she left an enemy port after the opening of hostilities (Art. 43)."[24]

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been paid in advance. Does this not encourage trade in contraband, and is it not proper to impose a certain penalty for the carriage of a proportion of contraband less than that required for condemnation? A kind of fine was proposed which should bear a relation to the value of the contraband articles. Objections of various kinds were expressed against this proposal, although the principle of the infliction of some pecuniary loss for the carriage of contraband seemed justified. The same object was attained in another way by providing that the expenses incurred by the captor in respect to the proceedings in the national prize court, as also for the custody of the vessel and her cargo during the proceedings, are to be borne by the vessel; the expense of the custody of the vessel including in this case the cost of the keep of the personnel of the captured vessel. It should be added that the loss caused to the vessel by being taken to and detained in a prize port is of such a nature as to constitute a most serious deterrent as regards the carriage of contraband." *Report*, cited above.

[23] D. L., 42. "The owner of the contraband is punished in the first place by the condemnation of his unlawful property; and in the second by that of his goods, even if innocent, which he may possess on board the same vessel." This is in accordance with the Anglo-American practice.

[24] D. L., 43. *Cf.* Arts. 23 and 25, *supra*, §§ 498 and 500. "This provision is intended to spare neutrals who might in fact be carrying contraband, but against whom no charge could be made. This may happen in two cases. The first is that in which they do not know of the opening of hostilities; the second is that in which, though aware of this, they do not know of the declaration of contraband made by a belligerent, in accordance with Articles 23 and 25, and which is properly applicable to the whole or a part of the cargo. It would be unjust to capture the ship and

512. **Provision for Delivery of Contraband Goods to the Belligerent Vessel.** — "A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband on board, may, when circumstances permit, be allowed to continue her voyage if the master is willing to deliver the contraband to the belligerent ship.

"The delivery of the contraband is to be entered by the captor on the logbook of the vessel stopped, and the master of the vessel must give to the captor duly certified copies of all relevant papers.

"The captor is free to destroy the contraband which is thus delivered to him (Art. 44)."[25]

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condemn the contraband; on the other hand, the cruiser cannot be obliged to allow to go on to the enemy goods suitable for use in the war and of which he may be in urgent need. These opposing interests are reconciled by making condemnation conditional on the payment of a compensation. (See for a similar idea the Convention of the 18th October, 1907, on the rules for enemy merchant vessels on the outbreak of hostilities.)" *Report, op. cit. Cf. supra*, § 348.

[25] D. L., 44. "A neutral vessel is stopped because of contraband. She is not liable to condemnation, because the contraband does not reach the proportion specified in Article 40. She can nevertheless be taken to a prize court in order that she may there receive judgment relative to the contraband. This right of the captor appears excessive in certain cases; if one compares the slight importance of the contraband (for instance, a case of guns or revolvers) with the heavy loss incurred by the vessel in being thus turned out of her course and detained during the time taken up by the proceedings. The question has, therefore, been asked whether the right of the neutral vessel to continue her voyage might not be admitted if the contraband articles were handed over to the captor, who, on his part, might only refuse them for sufficient reasons; for instance, the bad state of the sea, which would make transhipment impossible or difficult, well-founded suspicions as to the actual amount of contraband which the merchant vessel is carrying, the difficulty of stowing the articles on board the warship, etc. This proposal did not have sufficient support. It was alleged to be impossible to impose such an obligation on the cruiser, for which this handing over of goods would almost always have drawbacks. If, by chance, it has none, the cruiser will not refuse it, because she herself will have the advantage of not being turned out of her course by the necessity of taking the vessel to a port. The idea of an obligation having thus been excluded, it was decided to provide for the voluntary handing over of the contraband, which, it is hoped, will be carried out whenever possible, to the great advantage of both parties. The formalities provided for are very simple, and need no explanation.

"A judgment of a prize court must be rendered as regards the goods thus handed over. For this reason the captor must be furnished with the necessary papers. It may be supposed that there might be doubt as to the character of certain articles which the cruiser claims to be contraband; the master of the merchant vessel denies this, but prefers to deliver them so as to be free to continue the voyage. This is merely a capture which must be confined by the prize court.

"The contraband delivered by the merchant vessel may hamper the cruiser,

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Law of Contraband. — 13–15 *Annuaire, passim* (1907); * Atherley-Jones, *Commerce in War*, ch. 1; De Bar, in 26 *R. D. I.* (1894), 401 ff.; * Barclay, *Problems*, etc., 91–98, 168–169; Baty, *Britain and Sea Law* (1911), ch. 2; * *Ibid.*, *Int. Law in S. Africa* (1900), ch. 1; Bluntschli, Arts. 801–814; * Boeck, Nos. 606–659; * Bonfils (Fauchille), Nos. 1535–1583; Bentwich, *War and Private Property* (1907), chs. 8–9; * *Ibid.*, *The Declaration of London* (1911); Brocher de la Fléchère, in 31 *R. D. I.* (1899), 337 ff.; Brochet, *De la contrebande de guerre* (1900); Bynkershoek, *Questiones juris publici*, lib. I, cc. 9–12; Calvo, §§ 2708–2795; Cros, *De la notion de la contrebande*, etc. (1905); * Dana, note 226 to Wheaton, 629 ff.; Davis (3d ed.), ch. 13; * Dupuis, *La guerre maritime* (1899 and 1911), ch. 7; Fauchille, in 4 *R. G. D. I.* (1897), 297 ff.; 3 Fiore, Nos. 1591–1601; Florens, *De la notion de contrebande de guerre* (1907); Fromageot, in 27 *J. I. P.*, 29 ff.; Geffcken, in 4 Holtzendorff, 713–731; Historicus, *Letters of*, 121–137;

which must be left free, to destroy it at the moment it is handed over." *Report*, in *Int. Law Topics* (1908), 97–99; or Higgins, 592.

In the main, the rules relating to contraband adopted by the London Naval Conference must be pronounced a happy compromise of Anglo-American and Continental views on the whole favorable to neutral trade. The adoption of the category of conditional contraband and the application of the doctrine of "continuous voyage" to absolute contraband have been criticized; but the former may be defended as in accordance with international practice, and the latter as a reasonable compromise. "Saddle, draft and pack animals" should be removed from the list of absolute to that of conditional contraband.

There is one omission which should be particularly noted. The Declaration does not provide for *preëmption* except in the cases specified in Arts. 29 and 43. Some countries at times resort to the practice of preëmption, *i.e.* instead of absolutely confiscating the goods they prefer forcible purchase at the original cost of the goods plus expenses or freight and a reasonable profit. Thus, the British Admiralty Manual of 1888 (No. 84) states: "The carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state, and are the produce of the country exporting them, is usually followed only by the preëmption of such goods by the British Government, which then pays freight to the vessel carrying the goods." In such cases the British Courts of Admiralty have been accustomed to award the original price actually paid by the exporter plus his expenses and a reasonable profit, usually reckoned at ten per cent. See the *Haabet*, 2 C. Rob. 174.

In 1896 The Institute of International Law recognized the right of preëmption in the case of articles *ancipitus usus*. See 15 *Annuaire* (1896), 230.

Since preëmption is a mitigation of the rule prescribing confiscation as the penalty for the carriage of contraband, it is, of course, always open to belligerents to resort to it in all cases where the goods are undoubtedly contraband.

Grotius, lib. III, c. 1, § 5; Hall, Pt. IV, ch. 5; 2 Halleck (Baker's 3d ed.), ch. 26; Hart, in 17 *L. Q. R.* (1901), 193 ff.; 2 Hautefeuille, 65–176; Heineccius, *De navibus*, etc. (1740); Hershey (for Russo-Japanese War), ch. 6; Heffter (Geffcken), §§ 158–161; Hold de Ferneck, *Die Kriegskonterbande* (1907); Holland, in 31 *J. I. P.*, 335; *Ibid.*, *Manual of Prize Law* (1888), Nos. 57–87; Hübner, *De la saisie des bâtiments neutres* (1759); * Kleen, *De la contrebande*, etc. (1893); *Ibid.*, in 25–27 *R. D. I.* (1893–1895), *passim; Ibid.*, *Lois de la neutralité* (1898), I, 348–452; Knight, *Des états neutres au pont de vue de la contrebande de guerre* (1903); * Lawrence, *Principles*, Pt. IV, ch. 6; *Ibid.*, *War and Neutrality*, ch. 7; Liszt, § 42; Maine, 96–112; Manning, 352–399; Manceaux, *De la contrebande de guerre* (1899); 3 F. de Martens, § 136; * 7 Moore, *Digest*, ch. 26; Moseley, *What is Contraband and what is not* (1861); * 2 Oppenheim, Pt. III, ch. 4; 2 Ortolan, liv. III, ch. 6; Perels, §§ 44–46; Pillet, 315–330; Pilidi, *De combustible en temps de guerre*, etc. (1909); 3 Phillimore, Pt. 10, ch. 1; Remy, *Théorie de la continuité du voyage*, etc. (1902); 2 Rivier, 416–423; * Scott, *Cases*, 760–779; Smith and Sibley, *Russo-Japanese War*, ch. 13; Snow, *Cases*, 462–477; Stockton's (U. S.) *Naval War Code*, Arts. 34–36; * Takahashi (for Russo-Japanese War), Pt. IV, ch. 4, and Pt. V, ch. 4 (cases); Taylor, Pt. V, ch. 5; Testa, 201–220; Thonier, *De la notion de contrebande* (1904); 2 Twiss, ch. 7; Ullmann (2nd ed.), §§ 193–194; Upton, *The Law of Nations affecting Commerce during War* (1863); Vattel, liv. III, §§ 111–113; 2 Verraes, ch. 10; Vossen, *Die Konterbande des Kriegs* (1896); Walker, *Manual*, §§ 73–75; * 2 Westlake, ch. 10; *Ibid.*, in 2 *R. D. I.* (1870), 614 ff.; Wheaton, §§ 476–501, 505–509; 3 Wharton, ch. 19; Wiegener, *Die Kriegskonterbande*, etc. (1904); * Wilson, ch. 24; Woolsey, §§ 193–197.

For Bibliographies, see De Boeck, Bonfils, Kleen, Olivant, Pilidi, Thonier, and Wiegener.

CHAPTER XXXIV

THE LAW OF UNNEUTRAL SERVICE OR HOSTILE AID

513. **Difference between Contraband and Unneutral Service or Hostile Aid.** — "In a general way, it may be said that the merchant vessel which violates neutrality, whether by carrying contraband of war or by breaking a blockade, affords aid to the enemy, and it is on this ground that the belligerent whom she injures by her acts is justified in inflicting on her certain losses. But there are cases where such unneutral service bears a particularly distinctive character, and for such cases it has been thought necessary to make special provision. These have been divided into two classes according to the gravity of the act charged against the neutral vessel."[1]

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[1] *Report on the Declaration of London* as translated in *Int. Law Topics* (1909), 99; or Higgins, 593. The *Report* continues:

"In the cases included in the first class (Article 45), the vessel is condemned, and receives the treatment of a vessel subject to condemnation for carrying contraband. This means that the vessel does not lose her neutral character and is entitled to the rights conceded to neutral vessels; for instance, she may not be destroyed by the captor except under the conditions laid down for neutral vessels (Articles 48 *et seq.*) [*Cf. infra*, § 522]: the rule that the *flag covers the goods* applies to the goods on board.

"In the more serious cases belonging to the second class (Article 46), the vessel is likewise condemned; but further, she is treated not only as a vessel liable to confiscation for carrying contraband, but as an enemy merchant vessel, which treatment entails serious consequences. The rule governing destruction of neutral prizes does not apply to the vessel, and, as she has become an enemy vessel, it is no longer the second but the third rule of the Declaration of Paris which is applicable. The goods on board will be presumed to be enemy goods; neutrals will have the right to reclaim their property on establishing their neutrality (Article 59). [*Cf. supra*, § 443]. It would not, however, be necessary to go so far as to consider that the original neutral character of the vessel is completely lost, so that she should be treated as though she had always been an enemy vessel. The vessel may plead that the allegation made against her is not well-founded, that the act of which she is accused has not the character of unneutral service. She has therefore the right of appeal to the International Court in virtue of the provisions which protect neutral property."

The offenses of carrying contraband and engaging in unneutral service [2] are analogous in some respects, but there are also some marked contrasts. A leading authority on this subject has thus expressed these differences: "They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction, which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile, but warlike. In order that a cargo of contraband may be condemned as good prize, the captors must show that it was on the way to a belligerent destination. If without subterfuge it is bound to a neutral port, the voyage is innocent, whatever may be the nature of the goods. In the case of unneutral service the destination of the captured vessel is immaterial. The nature of her misson is the all-important point. She may be seized and confiscated when sailing between two neutral ports. The penalty for carrying contraband is the forfeiture of the forbidden goods, the ship being retained as prize of war only under special circumstances. The penalty for unneutral service is first and foremost the confiscation of the vessel, the goods on board being condemned when the owner is involved, or when fraud and concealment have been resorted to." [3]

514. **The Lesser Offences of Unneutral Service.** — "A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband of war:

"1. If she is on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed force of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

"2. If, with the knowledge of the owner, the one who charters the vessel entire, or the master, she is transporting a military detachment of the enemy, or one or more persons who, during the voyage, directly assist the operations of the enemy.

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[2] The term "unneutral service" is decidedly preferable to "analogues of contraband" still preferred by some authorities. "Hostile aid" would perhaps be preferable to either.

[3] Lawrence, *Principles* (3d ed.), § 284, p. 633. *Cf. Ibid.* (4th ed.), § 260. The last sentence of the above citation needs some slight modification.

" In the cases specified in the preceding paragraphs, goods belonging to the owner of the vessel are likewise liable to condemnation.

" The provisions of the present Article do not apply if when the vessel is encountered at sea she is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not yet been able to disembark the passengers. The vessel is deemed to be aware of the state of war if she left an enemy port after the opening of hostilities, or a neutral port after there had been made in sufficient time a notification of the opening of hostilities to the Power to which such port belongs (Art. 45)."[4]

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[4] D. L., 45. *Cf.* Art. 42, *supra*, § 510. "The first case supposes passengers traveling as *individuals;* the case of a *military detachment* is dealt with hereafter. It relates to individuals *embodied* in the armed military or naval forces of the enemy. There was some doubt as to the meaning of this word *embodied.* Does it include those individuals only who, summoned to serve in virtue of the law of their country, have really joined the corps to which they are to belong? Or does it also include such individuals from the time they are summoned, and before they have joined their corps? The question is of great practical importance. Suppose there are individuals who are natives of a country of continental Europe and settled in America; these individuals have military obligations towards their native country; they have, for instance, to belong to the reserve of the active army of that country. Their country being at war, they sail to perform their service. Shall they be considered as *embodied* in the sense of the provision which we are discussing? If we judged by the municipal law of certain countries, we might argue in the affirmative. But, apart from purely judicial reasons, the contrary opinion has seemed more in accordance with practical necessity and has been accepted by all in a spirit of conciliation. It would be difficult, or perhaps even impossible, without vexatious measures which neutral governments would not accept, to distinguish among the passengers in a vessel those who are bound to perform military service and are on their way to render it.

"The transmission of intelligence in the interest of the enemy is assimilated to the carriage of passengers embodied in his armed force. The reference to a vessel *especially* undertaking a voyage is intended to show that her usual service is not meant. She has been turned from her course; she has touched at a port where she does not ordinarily call, in order to embark the passengers in question. She need not be *exclusively* devoted to the service of the enemy; this last case would fall into the second class (Article 46, (4).

"In the two cases just mentioned the vessel has performed but a single act; she has been employed to carry certain people, or to transmit certain intelligence; she is continuously in the service of the enemy. It results from this that she may be captured during the voyage on which she is performing the work which has been assigned to her; once that voyage is finished, all is over, in the sense that she may not be

515. **The More Serious Offenses of Unneutral Service.** — "A neutral vessel will be condemned and will, in a general way, receive the same treatment as if she were a merchant vessel of the enemy:

"1. If she takes a direct part in the hostilities.

"2. If she is under the orders or under the control of an agent placed on board of the enemy Government.

"3. If she is chartered entire by the enemy Government.

"4. If she is at the time exclusively devoted either to the trans-

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captured for having done the work in question; this (principle) is analogous to that recognized in the case of contraband (Article 38). *Cf. supra*, § 509.

"The second case also falls under two heads:

"There is, first, the carriage of a military detachment of the enemy, or that of one or more persons who during the voyage directly assist his operations, for instance, by signalling. If they are soldiers or sailors in uniform there is no difficulty; the vessel is clearly liable to condemnation. If they are soldiers or sailors in citizen's dress who might be mistaken for ordinary passengers, knowledge on the part of the master or owner is required, the character being assimilated to the owner. The rule is the same in the case of persons directly assisting the enemy during the voyage.

"In such cases, if the vessel is condemned for unneutral service, the goods belonging to her owner are also liable to condemnation.

"These provisions assume that the state of war was known to the vessel engaged in the operations specified; such knowledge is the reason for and justification of her condemnation. The position is altogether different when the vessel is unaware of the opening of hostilities, so that she undertakes the service as in ordinary times. She may have learned of the opening of hostilities while at sea, but have had no chance of landing the persons whom she was carrying. Condemnation would then be unjust, and the equitable rule adopted is in accordance with the provisions already accepted in other matters. If a vessel has left an enemy port after such opening has been notified to the Powers to whom such port belongs, knowledge of a state of war will be presumed.

"The question here is merely one of preventing the condemnation of the vessel. The persons found on board who belong to the armed forces of the enemy may be made prisoners of war by the cruiser." *Report*, cited above.

Article 45 "is in a small measure a relaxation of the present English practice, by which a vessel might be condemned for carrying one or two officers of the enemy's forces, though in the course of an ordinary voyage, and though the masters and owners of the vessel were ignorant of the military character of the passengers." Bentwich, *The Dec. of London*, 87. *Cf.* the *Orozembo*, 6 C. Rob. 430, and Scott, 785.

For a digest of the leading cases, now no longer authoritative but still useful, see Dana, note to Wheaton; and 7 Moore, *Digest*, § 1264.

"It would be intolerable to-day that a neutral ocean liner should be liable to condemnation, because a belligerent cruiser found among her passengers one or two persons who were proceeding to the enemy country to join the enemy forces, and who had come aboard without the knowledge of any responsible person, as could very easily be managed." Bentwich, *op. cit.*, 87.

On the immunity of ordinary mail, *cf. supra*, § 412. Diplomatic dispatches are especially privileged. See the case of the *Caroline* (1808), 6 Rob. 464.

port of enemy troops or to the transmission of intelligence in the interest of the enemy.

"In the cases dealt with by the present Article, the goods belonging to the owner of the vessel are likewise liable to condemnation (Art. 46)." [5]

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[5] D. L., 46. "The cases here contemplated are more serious than those in Article 45, which justifies the severer treatment inflicted on the vessel, as has been explained above.

"*First Case.* — The vessel takes a direct part in the hostilities. This may take different forms. It goes without saying that if there is an armed conflict, the vessel is liable to all the risks of such a struggle. . . .

"*Second Case.* — The vessel is under the orders or control of an agent placed on board by the enemy Government. His presence marks the relation which exists between the enemy and the vessel. In other circumstances the vessel may also have relations with the enemy; but to be subject to condemnation, she must be in the third class.

"*Third Case.* — The whole vessel is chartered by the enemy Government, and is therefore entirely at its disposal; it can use her for different purposes more or less directly connected with the war, notably for purposes of transportation; such is the position of colliers which accompany a belligerent fleet. There will often be a charter party between the belligerent Government and the owner or master of the vessel; but it is only a question of proof. The fact that the whole vessel has been chartered suffices, in whatever way it may be established.

"*Fourth Case.* — The vessel is at the time exclusively devoted either to the carriage of enemy troops or to the transmission of intelligence in the enemy's interest. In distinction from cases dealt with by Article 45, the question here is one of a service to which the ship is permanently devoted. The decision accordingly is that, so long as such service lasts, the vessel is liable to capture, even if, at the moment, when an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence.

"As in the cases in Article 45 and for the same reasons, goods belonging to the owner of the vessel found on board are also liable to condemnation.

"It was proposed to treat as an enemy merchant vessel a neutral vessel making at the same time, and with the authorization of the enemy Government, a voyage which she has only been permitted to make after the opening of hostilities or during the two preceding months. This rule would be applicable notably to merchant vessels admitted by a belligerent reserved in time of peace to the national marine of that belligerent — for instance, to the coasting trade. Several Delegations formally rejected this proposal, so that the question thus raised remains an open one." *Report, op. cit.*

If this latter proposal had been adopted, it would have revived the Rule of 1756.

Bentwich (*op. cit.*, 90–91) makes the following comment upon Article 46:

"The consequence of assimilating the treatment of neutral vessels, committing the more serious breaches of neutral duty specified in this Article (46), with the treatment of enemy vessels is that —

"(1) Not only goods belonging to the owner of the vessel, but all enemy goods found on board, though not contraband, may be confiscated, although when shipping the vessel was neutral. . . .

"(2) The vessel may be sunk by the captor without being brought in for adjudication by a Prize Court. . . .

"Any individual embodied in the armed force of the enemy, who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel (Art. 47)." [6]

"As to the four circumstances which are required to attach enemy characters to the vessel, the first, taking direct part in hostilities, would include acting as scout, or giving notice to a blockading squadron of the approach of an enemy fleet or neutral merchantman, or laying or removing mines at sea. . . . The distinctive characteristic is that the vessel should be in the exclusive service of the enemy Government at the time of the capture, which virtually makes her an addition to the enemy's forces. Thus if a neutral vessel were solely engaged in providing the enemy's forces with coal or provisions, it would be treated as an enemy vessel. . . . Lastly, if a neutral vessel, though hired in times of peace, continues after the outbreak of war to transport troops or carry war material exclusively for the enemy, she is considered to identify herself with the enemy. . . . During the war between China and Japan in 1897 the Japanese sank an English vessel which was at the opening of hostilities captured in the act of transporting Chinese troops (*the Kowshing*); and no protest was made."

For the case of the *Kowshing*, see Takahashi, *Cases during the Chino-Japanese War* (1899). For the case of the *Cheltenham* during the *Russo-Japanese War*, see Hershey, 173 n. For the cases of the *Industrie* and the *Quangnam*, see Takahashi, 732–738.

[6] D. L., 47. "Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel which is visited and searched. If the vessel is subject to condemnation, the cruiser will capture her and take her to one of her own ports with the persons on board. Clearly the soldiers or sailors of the enemy State will not be set free, but will be treated as prisoners of war. It may happen that the case will not be one for the capture of the ship — for instance, because the master was unaware of the status of an individual who had come on board as an ordinary passenger. Must the soldier or soldiers on board the vessel be set free? This does not appear admissible. The belligerent cruiser cannot be compelled to set free active enemies who are physically in her power and are more dangerous than this or that contraband article; naturally she must act with great discretion, and it is at her own responsibility that she requires the surrender of these individuals, but she has the right to do so; it has therefore been thought necessary to explain the point." *Report*, in Higgins, 596–597; or *Int. Law Topics* (1909), 111.

"Article 47 gives the belligerent the right of removing from the neutral vessel any individual belonging to the enemy's forces; but to inculpate the vessel for such carriage there must be proof of unneutral intention shown by the fact that the vessel was not made in the ordinary course, but was specially undertaken in the enemy's interest." Bentwich, *op. cit.*, 87.

According to Article 47, Messrs. Slidell and Mason, agents of the Confederate Government, could not have been forcibly removed from the British mail steamer *Trent* (as they were by Captain Wilkes, the commander of the American cruiser *San Jacinto* in November, 1861), since they were not "embodied in the armed force of the enemy."

On the *Trent Affair*, see especially, Atherley-Jones, *Commerce in War*, 311–315; * Bernard, *Neutrality*, etc., ch. 9; * Dana, note 228 to Wheaton, 644 ff.; Hall (6th ed.), 682–685; 2 Halleck (Baker's 3d ed.), 293–301; * Harris, *The Trent Affair* (1896); Historicus, II, 187–198; Lawrence (3d ed.), § 284; Marquardsen, *Der Trent Fall* (1862); * 7 Moore, *Digest*, § 1265; 3 Wharton, § 374.

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CHAPTER XXXV

RIGHTS OF VISIT AND SEARCH, OF CAPTURE, AND CONDEMNATION BY PRIZE COURTS

516. **The Right of Visit and Search.** — In order to discover whether neutral vessels are engaged in such acts as carriage of contraband, unneutral service, breach of blockade, etc., as well as to determine the enemy or neutral character of ships and their cargoes, it is necessary to concede to properly commissioned warships the right of visit and search as ancillary to the rights of capture and subsequent condemnation by properly constituted prize courts.[1]

As Lord Stowell (then Sir William Scott) said (in 1799) in the famous case of the *Maria* (1 Robinson 340, 359, and Scott, 858):

"The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. . . . This right is so clear in principle, that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The right is equally clear in practice; for the practice is uniform and universal upon the subject." [2]

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[1] "It (the right of search) has been truly denominated a right growing out of, and ancillary to, the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never rise or come into question." C. J. Marshall, in *The Nereide* (1815), 9 Cranch, 388, 427.

Strictly speaking, it is a belligerent right and there is no right of visit apart from that of search.

The only exceptions to the non-exercise of the right of visitation and search in time of peace are in the case of a well-grounded suspicion of piracy (see *supra*, § 215), and when given by treaty to prevent slave trading (see *supra*, § 216).

[2] But Lord Stowell added that "the right must unquestionably be exercised with as little of personal harshness and of vexation as possible."

517. **The Mode of Exercising of this Right.** — "Subject to any especial treaty stipulations," the United States prescribed (in 1900) the following mode of procedure, "to be followed by the boarding vessel, whose colors must be displayed at the time":

"The vessel is brought to by firing a gun with blank charge. If this is not sufficient to cause her to lie to, a shot is fired across the bows, and in case of flight or resistance force can be used to compel the vessel to surrender.

"The boarding vessel should then send one of its smaller boats alongside, with an officer in charge wearing side arms, to conduct the search. Arms may be carried in the boat, but not upon the persons of the men. When the officer goes on board of the vessel he may be accompanied by not more than two men, unarmed, and he should at first examine the vessel's papers to ascertain her nationality, the nature of her cargo, and the ports of departure and destination. If the papers show contraband, an offense in respect of blockade, or enemy service, the vessel should be seized; otherwise she should be released, unless suspicious circumstances justify a further search. If the vessel be released, an entry in the log book to that effect should be made by the boarding officer."[3]

Other restrictions upon the right of visit and search are: (1) it is limited to properly commissioned belligerent cruisers; (2) it is restricted in its application to merchantmen; (3) it must not be exercised in neutral waters. Captures made in neutral territorial waters are invalid. *Cf. supra*, § 458.

[3] Art. 32 of Stockton's *Naval War Code* (withdrawn in 1904). *Cf.* Art. 130 of the U. S. Instructions to Blockading Vessels and Cruisers issued in 1898, and the Draft Convention suggested in 1804 by Secretary Madison, in 7 Moore, *Digest*, § 1200; Holland's *Manual of Prize Law* (1888), Nos. 195–230; Arts. 51–73 of the Japanese Regulations in Takahashi, App. V, 784–786; and §§ 10–22 of the Project adopted by the Institute of Int. Law (1883 and 1887), *Tableau*, etc., 197–200.

The authorities seem agreed that the belligerent warship may chase under false colors, but must not fire until she has hoisted her national flag.

Many treaties still stipulate that the visiting ship shall approach the vessel about to be visited no nearer than a cannon shot, but this rule is based upon earlier treaties and practices, and is to-day regarded as impracticable.

The ceremony of the *semonce* or affirming gun is customary, but not obligatory. Hailing by signals is also practiced.

There is some authority and practice in favor of the view that the captain of the vessel visited may be summoned to send or present his ship's papers on board the visiting vessel for purposes of examination, but this is expressly forbidden by Holland's *Manual*, No. 198, and § 12 of the Project of the Institutes, cited above.

On the *Formalities of Visit and Search*, see especially: *Atherley-Jones, In case "suspicious circumstances justify a further search,"[4] "care must be taken not to damage the vessel or the cargo, and no force whatever must be applied. No lock must be forcibly broken open by the search party, but the master is to be required to unlock it. . . .[5] Search being completed, everything has to be replaced with care."[6]

518. **Right of Capture.** — "Irrespective of the character of her cargo, or her purported destination, a neutral vessel should be seized if she —

"(1) Attempts to avoid search by escape;[7] but this must be clearly evident.

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ch. 6; Bonfils (Fauchille), Nos. 1402–1407; 5 Calvo, §§ 2944–2945, 2955–2956; Duboc, *Le droit de visites* (1902), *passim;* Hall (6th ed.), 730–733; 2 Kleen, § 193; 2 Oppenheim, §§ 418 ff.; Perels, § 54; and Taylor, §§ 687–688.

[4] According to § 19 of the Project of the Institute of Int. Law (*op. cit.*), "there is well-founded suspicion in the following cases:

"(1) When the vessel stopped was not brought to upon the invitation of the warship.

"(2) When it has resisted visit by means of hiding-places supposed to conceal papers on board or contraband of war.

"(3) When it has double, false, fraudulent or secret papers, in case its papers are insufficient, or if it has no papers.

"(4) When the papers have been thrown into the sea or destroyed in some manner, especially if these acts were done after the vessel was able to perceive the approach of the warship.

"(5) When the vessel stopped sails under a flag."

[5] A failure to comply with this demand would be construed as resistance and as justifying seizure.

[6] 2 Oppenheim, § 421. See especially Holland's *Manual*, Nos. 217–230.

[7] "Theory and practice agree that mere flight, mere attempt on the part of a neutral merchantman to escape visitation, does not in itself constitute resistance." 2 Oppenheim, § 423.

"A belligerent cruiser encounters a merchant and summons her to stop in order that it may proceed to visit and search. The vessel summoned does not stop, but tries to avoid visit and search by flight. The cruiser may employ force to stop her, and if the merchant vessel is damaged or sunk, she has no right to complain, since she has acted contrary to all obligation imposed upon her by the Law of Nations. If the vessel is stopped, and if it is shown that it was only in order to escape the inconvenience of visit and search that she had recourse to flight, and that otherwise she had done nothing contrary to neutrality, she will not be punished for her attempt. If, on the other hand, it is established that the vessel has contraband on board, or that she has in any way whatever violated her neutral obligations, she will suffer the consequences of her infraction of neutrality, but she will not undergo any further punishment for her attempt at flight. Some thought, on the contrary, that the ship should be punished for an obvious attempt at flight as much as for forcible resistance. It was said that the possibility of condemnation of the escaping vessel would lead the cruiser to spare her so far as possible. But this view did not

"(2) Resists search by violence.

"(3) Presents fraudulent papers.

"(4) Is not supplied with the necessary papers to establish the objects of search.

"(5) Destroys, defaces, or conceals papers."[8]

519. **Resistance to Visit and Search.** — "Forcible resistance to the legitimate exercise of the right of stoppage, visit and search, and capture involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment which the cargo of an enemy vessel would undergo. Goods belonging to the master or owner of the vessel are regarded as enemy goods."[9]

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prevail." *Report* to the London Naval Conference, in *Int. Law Topics* (1909), 145; or Higgins, 608.

[8] Stockton's *Code*, *op. cit.*, Art. 33; and *Instructions* to U. S. Blockading Vessels and Cruisers (1898), Art. 14, in 7 Moore, *Digest*, p. 485.

"The papers generally expected to be on board a vessel are:

"1. The register. 2. The crew and passenger list. 3. The log book. 4. A bill of health. 5. The manifest of cargo. 6. A charter party if the vessel is chartered. 7. Invoices and bills of lading." *Ibid.*

For definitions of these and other terms and the requirements on this head of the leading maritime nations, see Atherley-Jones, *Commerce in War*, 345–352.

Mere deficiency of papers does not arouse the same degree of suspicion as spoliation, destruction, defacement, or concealment of papers. The highest suspicion is aroused by false or double papers. Grave suspicion of such offenses justifies capture. See especially Hall (6th ed.), 736–738; 2 Halleck (3d ed.), 270–272; * 2 Oppenheim, §§ 426–428; Taylor, § 690.

[9] D. L. (Declaration of London), Art. 63. Forcible resistance is construed as an act of hostility and renders the vessel liable to condemnation, even in cases where no acts contrary to neutrality were committed.

The cargo is assimilated to cargo on board an enemy vessel. "This assimilation involves the following consequences: the neutral vessel which has resisted becomes an enemy vessel, the goods on board are presumed to be enemy goods. Neutrals who are interested may claim their property, in accordance with Article 3 of the Declaration of Paris; but enemy goods will be condemned because the rule *the flag covers the goods* cannot be adduced, as the captured vessel on which they are found is considered an enemy. It will be noticed that the right to claim the goods is recognized for all neutrals, even for those who are of the nationality of the captured vessel; it would seem to be excessive to make such persons suffer for the action of the master. There is, however, an exception as regards the goods belonging to the owner of the vessel. It seems natural that he should bear the consequences of the acts of his agent. His property on board the vessel is therefore treated as enemy goods. *A fortiore* the same rule applies to the master." *Report*, cited above.

"The assimilation of the prize which resists capture has the consequence (1) that it may be sunk by the captor, subject only to his obligation to pay compensation to any innocent neutral who proves that he had an innocent cargo on board,

520. **Convoy.** — "Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by visit and search (Art. 61)."[10]

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(2) that all the cargo is presumed to be enemy property, and (3) that any enemy goods on board are confiscated. Goods belonging to the master or owner of the vessel are also confiscated; but any other neutral who owns part of the cargo may prove the innocent character of his property and obtain restitution of his property, or, if it has been destroyed, compensation, because neutral goods on enemy vessels are free from capture." Bentwich, *The Dec. of London*, 121.

In the case of *The Fanny* (1815, 1 Dodson, 443), Lord Stowell condemned neutral goods found on board an armed enemy merchantman on the ground that the shipper might have intended to resist visitation and search. But the Supreme Court of the United States maintained the opposite view in the case of *The Nereide* (9 Cranch, 388, and Scott, 884), decided the same year (1815). Story dissented from the opinion of the majority of the Court as expressed by C. J. Marshall. The more reasonable view expressed by Lord Stowell and J. Story has generally been preferred by commentators, and would probably be followed by the International Prize Court.

[10] D. L., 61. The *Report*, cited above, furnishes the following comments upon this article:

"The principle laid down is simple; a neutral vessel convoyed by a warship of her own nationality is exempt from visit and search. The reason for this is that the commander of the belligerent cruiser ought to find in the assurances of the commander of the convoy the guarantee that the exercise of the right of visit and search itself would afford; in fact, he cannot question the assurances given by the official representative of a neutral Government, without failing in international courtesy. If neutral Governments allow belligerents to visit and search vessels sailing under their flag, it is because they do not wish to assume the responsibility for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation changes when a neutral Government consents to assume that responsibility; the right of visit and search has no longer the same ground.

"But it follows from the explanation of the rule given respecting convoy that the neutral Government undertakes to give the belligerents every guarantee that the vessels convoyed shall not take advantage of the protection which is accorded to them in order to do anything contrary to neutrality, for example, to carry contraband of war, to render unneutral service to the belligerent, to attempt to violate blockade. There is need, therefore, of a genuine supervision to be exercised from the outset over the vessels about to be convoyed, and that supervision should be continued throughout the voyage. The Government must act with vigilance so as to prevent all abuse of convoy, and will give to this end precise instructions to the officer placed in command of a convoy.

"A belligerent cruiser encounters a convoy; she communicates with the commander of the convoy, who should, at her request, give in writing all relevant information respecting the vessels under his protection. A written declaration is required, because it prevents all ambiguities and misunderstandings, and because it binds more fully the responsibility of the commander. This declaration has for its aims

"If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. He must record the result of such investigation in a report, of which a copy is furnished to the officer of the warship. If, in the opinion of the commander of the convoy, the facts thus stated justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels (Art. 62)." [11]

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to make visit and search unnecessary by the mere fact that this would afford to the cruiser the information which the visit and search would have supplied."

[11] D. L., 62. "Usually the commander of the cruiser will accept the declaration which the commander of the convoy will have given to him, but he may have serious grounds for believing that the confidence of the commander has been betrayed, that a convoyed ship of which the papers are apparently regular and exhibit nothing suspicious is, in fact, carrying contraband cleverly concealed. The cruiser may communicate her suspicions to the commander of the convoy. An investigation may be considered necessary. It is made by the commander of the convoy; it is he alone who exercises authority over the vessels placed under his protection. It appeared, nevertheless, that much difficulty might be avoided if the belligerent were allowed to be present at this investigation; otherwise he might still suspect, if not the good faith, at least the vigilance and perspicacity of the one who makes the search. But it was not thought that an obligation to allow the officer of the cruiser to be present should be imposed upon the commander of the convoy. He will act as he judges best; if he agrees to the presence of an officer of the cruiser, it will be as an act of courtesy or good policy. He must in every case make a report of the investigation and give a copy to the officer of the cruiser.

"Differences may arise between the two officers, particularly in regard to conditional contraband. The character of a port to which grain is destined may be disputed. Is it an ordinary commercial port? Is it a port which serves as a base of supplies for the armed forces? The situation which arises out of the fact of the convoy must in such a case prevail. The officer of the cruiser can do no more than make his protest, and the difficulty will be settled through the diplomatic channel.

"The situation is altogether different if a convoyed vessel is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection depends has not been fulfilled. She has deceived her own Government, and has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel which, in the ordinary way, encounters a belligerent cruiser and is visited and searched by her. She cannot complain at being treated thus rigorously, since there is in her case an aggravation of the offense, committed by a carrier of contraband." *Report, op. cit.*, in *Int. Law Topics* (1909), 138–142; or Higgins, 606–608.

"Neutral vessels seeking to break blockade enjoy no immunity by reason of convoy, if after notice to the convoying ship, they come within the sphere of operations of the blockading force." Bentwich, *The Dec. of London* (1911), 118.

Articles 61–62 of the Declaration of London probably furnish a happy ending and final solution of a long-standing controversy. Continental jurists and international

521. **Prizes sent in for Adjudication.** — In case there is evidence or serious ground for suspicion of carriage of contraband, breach of blockade, unneutral service, or of the commission of any of the acts enumerated in § 518, the captured neutral prize should be conducted to a port where a Prize Court is in session for the purposes of adjudication.[12]

"Prizes should be sent in for adjudication, unless otherwise directed, to the nearest suitable port, within the territory of the United States, in which a Prize Court may take action.

"The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be carefully sealed at the time of seizure, and kept in the custody of the prize master.

"All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and if circumstances permit, it is preferable that the officer making the search should act as prize master." [13]

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practice generally favored exemption from search of neutral merchantmen under warships of their own nationality. And the United States has usually followed the Continental practice, though her jurists and publicists have almost uniformly opposed it. In recent times Great Britain remained practically the sole champion of the opposition to the Right of Convoy, though in practice, as pointed out by Lord Grey, the British doctrine was waived in 1854 and has not been enforced in any recent war. *Parl. Blue Book*, Misc., No. 4 (1909), p. 25. The leading case was that of *The Maria* (1799), 1 C. Rob. 340, and Scott, 858.

Belligerent or enemy convoy constitutes constructive resistance and entails condemnation and confiscation. See *The Schooner Nancy* (1892), 27 Ct. Cl. 99, and Scott, 861; *The Brig Sea Nymph* (1901), 36 Ct. Cl. 369, and Scott, 869; and the dissenting opinion of J. Story, in *The Nereide*, 9 Cranch, 388, 445, 453–454.

On *Convoy*, see especially: Atherley-Jones, 322–328, 331–337; * Bentwich, *The Dec. of London*, ch. 7; * Bonfils (Fauchille), Nos. 1597–1605; 5 Calvo, §§ 2969 ff.; Dana, note 242 to Wheaton; * Dupuis (1899 and 1911), ch. 9; * Hall, Pt. IV, ch. 10; 2 Halleck (3d ed.), 260–268; Heffter, § 170; Hershey, note on pp. 150–151; 3 Hautefeuille, Tit. XI, ch. 3; * 2 Kleen, 346–390; Lawrence (3d ed.), § 268; *Ibid.* (4th ed.), § 245; * 7 Moore, *Digest*, §§ 1204–1205; Ortolan, liv. III, ch. 7; Perels, § 56; 3 Phillimore, § 338; Taylor, § 693; 2 Westlake, 259–261; Wheaton, §§ 525 ff.; Woolsey, §§ 209–211.

[12] *Cf. supra*, § 436, on the capture of enemy vessels. On the treatment of officers and crew, see *supra*, § 414.

[13] Stockton's (U. S.) *Naval War Code*, Arts. 46–48. *Cf.* the U. S. Instructions to Blockading Vessels and Cruisers issued in 1898, and §§ 4615–4617 of the Revised Statutes of 1878, in 7 Moore, *Digest*, § 1212, pp. 514–515; Holland's *Manual of (British) Prize Law* (1888), Nos. 231–314; §§ 45–62 of the Project adopted by the Institute of Int. Law, in *Tableau*, etc., 204–208; and ch. 8, Arts. 74–97, of the Japanese Regulations (1904), in Takahashi, 786–788.

522. **Destruction of Neutral Prizes.** — "A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights respecting the validity of the capture (Art. 48)." [14]

"As an exception, a neutral vessel captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the warship, or to the success of the operations in which she is engaged at the time (Art. 49)." [15]

"Before the destruction, the persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the decision as to the validity of the capture must be taken on board the warship (Art. 50)." [16]

"A captor who has destroyed a neutral vessel must, as a condition precedent to any decision upon the validity of the capture, establish in fact that he only acted in the face of an exceptional necessity such as is contemplated in Article 49. If he fails to do this, he must compensate the parties interested without examination as to whether the capture was valid or not (Art. 51)."[17]

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[14] D. L., 48. "The general principle is very simple. A captured neutral vessel may not be destroyed by the captor; that may be admitted by every one, whatever view is taken as to the effect produced by the capture. The vessel must be taken into a port for the determination there as to the validity of the prize. A prize crew will or will not be put on board, according to circumstances." *Report* on the Dec. of London, in *Int. Law Topics* (1909), 113; or Higgins, 598.

For the conditions justifying the admission of prizes into neutral ports, see 13 H. C., Arts. 21–23, *supra*, § 473.

[15] D. L., 49. "The first condition necessary in order to justify the destruction of the captured vessel is that she should be liable to condemnation upon the facts of the case. If the captor cannot even hope to obtain the condemnation of the vessel, how can he lay claim to destroy her?

"The second condition is that the observance of the general principle would naturally involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time. This is the regulation on which agreement was reached after various tentative propositions. It was understood that the phrase *compromettre la sécurité* was synonymous with *mettre en danger le navire*, and might be translated into English by *involve danger*. It is, of course, the situation at the moment when the destruction takes place which must be considered in order to decide whether the conditions are or are not fulfilled. A danger which did not exist at the actual moment of the capture may have appeared some time afterwards." *Report*, cited above.

[16] D. L., 50. "This provision lays down the precautions to be taken in the interests of the persons (on board) and of the administration of justice."

"If the capture of a neutral vessel, of which the destruction has been justified, is subsequently held to be invalid, the captor must compensate those interested, in place of the restitution to which they would have been entitled (Art. 52)."

"If neutral goods which were not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation (Art. 53)."[18]

"The captor has the right to require the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel which is not herself liable to condemnation, provided that the circumstances are such as would, according to Article 49, justify the destruction of a vessel liable to condemnation. The captor must enter the goods delivered or destroyed in the log book of the vessel stopped, and must obtain from the master duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities carried out, the master must be allowed to continue his voyage.

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[17] D. L., 51. "This provision gives a guarantee against the arbitrary destruction of prizes by establishing a real responsibility of the captor who has carried out the destruction. Before any decision respecting the validity of the prize is given, the captor must actually prove that he was really in such an exceptional situation as was specified. This must be proved in proceedings to which the neutral is a party who, if not satisfied with the decision of the National Prize Court, may take his case before the International Court. This proof is, therefore, a condition precedent which the captor must fulfil. If he does not do this, he must compensate those interested in the vessel and the cargo, without any investigation as to whether the capture was valid or not. In this way a positive sanction is provided in respect to the obligation not to destroy a prize except in the cases specified; this sanction is a fine inflicted on the captor. If, on the other hand, this proof is given, the prize procedure follows the usual course; if the prize is declared valid, no compensation is due; if it is declared void, those interested have a right to be compensated. Resort to the International Court can be had only after the decision of the prize court has been rendered on the whole matter, and not immediately after the preliminary question has been decided." *Report, op. cit.*

[18] D. L., 52–53. Suppose a vessel which has been destroyed carried neutral goods not liable to condemnation: the owner of such goods has, in every case, a right to compensation, that is to say, without having to distinguish as to whether the destruction was or was not justified. This is equitable and is a further guarantee against arbitrary destruction." *Report,* cited above.

"As regards innocent neutral goods sunk with enemy prizes, the Declaration does not strictly apply. . . . The full recognition, however, in the Declaration of the right of the owner to recover compensation, when his innocent goods are sunk with a neutral prize, must strengthen the argument of those who hold that he should be entitled to compensation whenever a belligerent interferes with his innocent trade. It is likely that the International Prize Court would find in the neutral's favor if the point were brought before them." Bentwich, *op. cit.*, 100.

" The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable (Art. 54)." [19]

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[19] D. L., 54. *Cf.* D. L., 44, *supra*, § 512. The *Report*, cited above, furnishes the following comment upon this Article, which introduces an innovation into international practice:

"A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in Article 40. [*Cf. supra*, § 510.] The captain of the cruiser may put a prize crew on board the vessel and take her into port for adjudication. He may, in conformity with the provisions of Article 44, accept the delivery of the contraband which is offered to him by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to deliver the contraband, and the cruiser is not in a position to take the vessel into one of her ports. Is the cruiser obliged to let the neutral vessel go with the contraband on board? This has seemed excessive, at least in certain exceptional circumstances. These are in fact the same which would have justified the destruction of the vessel, if she had been liable to condemnation. In such a case the cruiser may require the delivery or proceed to the destruction of the goods liable to condemnation. The reasons which warrant the destruction of the vessel would justify the destruction of the contraband goods, the more so as the considerations of humanity which may be invoked in case of the destruction of a vessel do not apply here. Against an arbitrary demand by the cruiser there are the same guarantees as those which made it possible to recognize the right to destroy the vessel. The captor must, as a condition precedent, prove that he found himself in the exceptional circumstances specified; failing this, he is penalized to the value of the goods delivered or destroyed, without investigation as to whether they were or were not contraband.

"The Article prescribes certain formalities which are necessary to establish the facts of the case and to enable the prize court to adjudicate.

"Of course when once the goods have been delivered or destroyed, and the formalities carried out, the vessel which has been stopped must be left free to continue her voyage."

Prior to the adoption of the above rules on the "Destruction of Neutral Prizes" by the London Naval Conference of 1909, there had been much disagreement among the authorities and in international practice on this subject. The Second Hague Peace Conference of 1907 had vainly attempted a solution of the problem. The solution effected by the London Conference appears to be as satisfactory as could be expected under the circumstances.

On the *Destruction of Neutral Prizes*, see: * Atherley-Jones, 531–538; * Barclay, *Problems*, etc., 99–102; Bonfils (Fauchille), No. 1415; 5 Calvo, §§ 3019, 3028–3034; Dana, note 186 to Wheaton, p. 485; * Dupuis (1899 and 1901), Nos. 261–268 and 206–217 respectively; 3 Fiore, No. 1655; Hall (6th ed.), 739; * Hershey (for Russo-Japanese War, especially case of *The Knight Commander*), 156–159; * Holland's *Prize Law* (for British practice), No. 303; *Ibid.*, *Neutral Duties*, etc., in 2 *Proceedings* of the British Academy (1905), 12–13; *Ibid.*, in *War and Neutrality*,

523. **National Prize Courts.** — National Prize Courts are municipal tribunals set by belligerent States for the purposes of adjudicating upon captured or destroyed prizes.[20] They are supposed to administer International Law, and usually make an honest effort to do so; but in case the rules laid down by superior legislative or administrative authority conflict with the Law of Nations, they are bound by municipal rather than by International Law.[21]

524. **Their Jurisdiction.** — "The jurisdiction of prize courts extends over all captures made in war by their country's cruisers, over all captures made on land by a naval force acting alone or in conjunction with military forces, and over seizures made afloat by the joint operation of land and sea forces. It also includes all recaptures, ransoms, and ransom bills, and all incidental questions growing out of the circumstances of capture such as freights and damages. And when it was customary for States to make seizures afloat in anticipation of war, the cases that arose therefrom were taken before the prize courts. Speaking generally, we may lay down the proposition that the courts of neutrals have no jurisdiction over the captures of belligerents." [22]

140–150; *Int. Law Situations* (1905), 62–76; 2 Kleen, 529–534; Lawrence, *Principles* (3d ed.), § 215; *Ibid.*, (4th ed.), 191; **Ibid.*, *War and Neutrality*, 250 ff.; 3 F. de Martens, 126, p. 298; *7 Moore, *Digest*, § 1212; 2 Oppenheim, § 431; Perels, § 55, p. 344; 2 Rivier, 350; 1 Scott (for Hague Conference), 725–730; Smith and Sibley (for Russo-Japanese War), ch. 12; Takahashi, *Cases on Int. Law during the Chino-Japanese War* (for the case of the *Kowshing*), 26–31, 46–47; * *Ibid.*, *Int. Law during the Russo-Japanese War*, 310–336; Taylor, § 691; * 2 Westlake, 318–321; * Wilson, §§ 131 and 185.

Cf. Destruction of Enemy Prizes, supra, § 438.

[20] They may not be set up in neutral territory. *Cf. supra*, § 460.

[21] There is some good authority to the contrary (*e.g.* 2 Halleck, 3d ed., 411–412), but such a view would be anarchical in its effects if put into practice. The institution of the International Prize Court will doubtless result in a more internationalized body of prize court jurisprudence.

[22] Lawrence, *Principles* (4th ed.), § 189. Lawrence adds: "But to this rule there are exceptions. Jurisdiction exists and can be exercised when the capture is made within the territorial limits of the neutral State, or when a vessel, originally equipped for war within neutral jurisdiction, or afterwards made efficient by an augmentation of warlike force therein, takes a prize at sea and brings it within the waters of the injured neutral during the voyage in which the illegal equipment or augmentation took place. In both cases neutral sovereignty is violated by one belligerent, and in consequence the neutral is exposed to claims and remonstrances from the other. Jurisdiction is therefore conferred upon it for its own protection,

525. **The International Prize Court.** — As a remedy for the imperfections of the system of National Prize Courts, the Hague Conference of 1907 agreed upon the following provisions for establishment of an International Prize Court:

"When neutral or enemy property is involved, the validity of the capture of a merchant ship or its cargo is decided before a Prize Court in accordance with the present Convention (Art. 1)."[23]

"Jurisdiction in matters of prize is exercised in the first instance by the Prize Courts of the belligerent captor.

"The judgments of these Courts are pronounced in public or are officially notified to the parties concerned who are neutrals or enemies (Art. 2)."

526. **Right of Appeal.** — "The judgments of National Prize Courts may be brought before the International Prize Court:

"(1) When the judgment of the National Prize Courts affects the property of a neutral Power or individual;

"(2) When the judgment affects enemy property and relates to

"(*a*) Cargo on board a neutral ship;

"(*b*) An enemy ship captured in the territorial waters of a

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and in order that it may insist upon the restoration of the property unlawfully taken." See case of the *Santissima Trinidad* (Scott's *Cases*, 701–705).

Adjudication in a national prize court is usually rather in the nature of an inquest upon property than of an issue between parties as in ordinary trials. The inquest begins with an inquiry by the Government of the captors into the facts. This involves an examination by the court of the vessel and its cargo, the ship's papers, and the persons on board. The parties litigant do not themselves appear at this stage of the inquest. Then follow arguments by counsel. The burden of proof lies on the claimants, *i.e.* there is a presumption in favor of the captors. If the evidence *in preparatory*, *i.e.* the evidence thus far discovered, is sufficient for condemnation, the court gives its decision accordingly. If this evidence is insufficient, the court may call for further proof, *i.e.* proof beyond the vessel, cargo, papers, and persons on board. The proceedings now assume more closely the form of a trial between litigants, though there are, strictly speaking, no pleadings.

On *Prize Court Procedure*, see especially: Bulmerincq, in 11 *R. D. I.* (1879), *passim;* De Boeck, Nos. 363–380, 769–790; * Dana, note 186 to Wheaton, 480 ff.; Lawrence (3d ed.), § 214; 7 Moore, *Digest*, §§ 1232 ff.; 3 Phillimore, § 481; Story, *Notes on*, etc. (1854); 3 Wharton, § 330.

[23] 12 H. C. (1907), 1. "The general principle that every case of prize shall be decided by the National Prize Court of the captor, whether neutral or enemy property is concerned, is laid down by Article 1. Any questions affecting a belligerent's treatment of his own subjects for such matters as trading with the enemy are excluded from this Convention." Higgins, 436.

neutral Power, when that Power has not made the capture the subject of a diplomatic claim;[24]

"(*c*) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between belligerent Powers, or of an enactment issued by the belligerent captor.

"The appeal against the judgment of the National Courts can be based on the ground that the judgment was wrong either in fact or law (Art. 3)."[25]

"An appeal may be brought:

"(1) By a neutral Power, if the judgment of the National Courts injuriously affects its property or the property of its nationals (Article 3, (1)), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3) (2), (*b*);

"(2) By a neutral individual, if the judgment of the National Courts injuriously affects his property (Article 3, (1)), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

"(3) By an individual subject or citizen of an enemy Power, if the judgment by the National Courts injuriously affects his property in the cases referred to in Article 3, (2), except that mentioned in paragraph (*b*) (Art. 4)."[26]

"When in accordance with the above Article 3, the International Court has jurisdiction, the National Courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in the first instance or only after an appeal.

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[24] *Cf.* 13 H. C. (1907), 3, *supra*, § 459.

[25] 12 H. C., 3. It thus appears that the right of appeal where neutral property is involved is unlimited, whereas belligerents can only appeal in these special cases.

[26] 12 H. C., 4. "Individuals may appeal, but a neutral Government may in some cases think it necessary to intervene to protect the interests of a subject, or even to prevent him from appealing. The Court itself is judge of its own competence as to matters coming before it under the Convention." Higgins, 437.

"An appeal may also be brought on the same conditions as in the preceding Article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, when they have taken part in the proceedings before the National Court. Persons so entitled may appeal separately to the extent of their interest.

"The same rule applies in the case of persons belonging either to neutral States or to the enemy, who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision (Art. 5 of 12 H. C.)."

"If the National Courts fail to give final judgment within two years from the date of capture, the cause may be carried direct to the International Court (Art. 6)." [27]

527. **The Law to be Administered.** — "If the question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself, or whose national is, a party to the proceedings, the Court is governed by the provisions of the said treaty.

"In the absence of such provisions, the Court shall apply the rules of International Law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

"The above provisions apply equally to questions relating to the order and mode of proof.

"If, in accordance with Article 3, (2) (*c*), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce such enactment.

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[27] 12 H. C., 6. *Cf.* Art. 8 *infra*. In order to overcome certain so-called constitutional objections to permitting direct appeal from decisions of our Supreme Court, the United States secured in 1901 the adoption of two additional Articles to the Convention for the Establishment of an International Prize Court, which may be regarded as an amendment to Articles 3, 6, and 8 of 12 H. C.

"Art. 1. The Powers signatory or adhering to the Hague Convention of October 18, 1907, relative to the establishment of an International Court of Prize, which are prevented by difficulties of a constitutional nature from accepting the said Convention in its present form, have the right to declare in the instrument of ratification or adherence that in prize cases, whereof their national courts have jurisdiction, recourse to the International Prize Court can only be exercised against them in the form of an action in damages for the injury caused by the capture.

"Art. 2. In the case of recourse to the International Prize Court, in the form of an action for damages, Article 8 of the Convention is not applicable; it is not for the Court to pass upon the validity or the nullity of the capture, nor to reverse or affirm the decision of the national tribunals.

"If the capture is considered illegal, the Court determines the amount of damages to be allowed, if any, to the claimants." See Scott, in 5 A. J. (1911), 302–303, 311–314.

"As a matter of fact, the decisions of our Supreme Court have been virtually reversed by Mixed Commissioners upon several occasions." This was notably so in the case of *The Circassian* (1864), 2 Wallace, 135, and 4 Moore, *Int. Arbitrations*, 3911. Scott, *op. cit.*, 313.

For a list of cases in which an International Tribunal decided adversely to a Supreme Court decision, see 1 Scott, *The Hague Peace Conferences*, note on p. 478.

"The Court may disregard failure to comply with the procedure laid down by the laws of the belligerent captor, when it is of opinion that its consequences are unjust and inequitable (Art. 7)." [28]

"If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

"If it pronounces the capture to be null, the Court shall order restoration of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

"If the National Prize Court pronounced the capture to be null, the Court can only be asked to decide as to the damages (Art.)." [29]

"The contracting Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay (Art. 9)."

528. **The Constitution of the Court.** — "The International Prize Court is composed of Judges and Deputy Judges, who will be appointed by the contracting Powers, and must all be jurists of known proficiency in questions of International Maritime Law, and of the highest moral reputation (Art. 10). . . ."

"The Judges and Deputy Judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899. Their appointments can be renewed (Art. 11)." [30]

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[28] H. C., 7. This Article has called forth much opposition and criticism. See, *e.g.* 2 Westlake, 293–296. See 1 Scott, 491 ff., for a long citation from the "luminous" Report on the Court presented to the Conference by Professor Renault.

In view of the eminently successful work of the London Naval Conference in codifying the major portion of International Maritime Law, the objections to Article 7 have been deprived of most of their original force.

[29] 12 H. C., 8. *Cf.* note on Art. 6, *supra.* See the comments of Renault and Scott, in 1 Scott, 501–502.

[30] 12 H.C., Arts. 10–11. *Cf.* 1 H. C. (1907), 44, § 314.

Art. 10 adds: "The appointment of these Judges and Deputy Judges shall be made within six months after the ratification of the present Convention."

Art. 11 adds: "Should one of the Judges or Deputy Judges die or resign, the

"The Court is composed of fifteen Judges; nine Judges constitute a quorum.

"A Judge who is absent or prevented from sitting is replaced by a Deputy Judge (Art. 14)."

"The Judges appointed by the following contracting Powers: Germany, The United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

"The Judges and Deputy Judges appointed by the other Contracting Powers sit by rota as shown by the Table annexed to the present Convention. Their duties may be performed successively by the same person. The same Judge may be appointed by several of the said Powers (Art. 15)." [31]

"No Judge can sit who has been a party, in any way whatever, to the sentence pronounced by the National Courts, or who has

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same procedure is followed in filling the vacancy as was followed in appointing him. In this case the appointment is made for a fresh period of six years."

"The judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (Article 11, par. 1), and if they sit by rota (Article 15, par. 2), according to the date on which they entered upon their duties. When the date is the same, the senior in age takes precedence.

"The Deputy Judges when acting are in the same position as the Judges. They rank, however, after them (Art. 12 of 12 H. C.)."

"The Judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country (*Cf.* 1 H. C. (1907), Art. 46, par. 4).

"Before taking their seat the Judges must take an oath, or make a solemn affirmation before the Administrative Council, to discharge their duties impartially and conscientiously (Art. 16 of 12 H. C.)."

[31] 12 H. C., 14–15. Article 15 was strongly opposed by the smaller States whose cause was ably championed by M. Barbosa of Brazil.

"On signing the Convention the following States made reservations on Article 15 . . .: Chile, Cuba, Ecuador, Guatemala, Hayti, Persia, Salvador, Siam, Turkey, and Uruguay." Higgins, 441.

For the Table annexed to Article 15 showing the distribution of Judges and Deputy Judges by countries for each year of the period of six years, see Higgins, 430; Scott, *Texts*, etc., 316–317; or 2 Scott, 504–506. By consulting this table, it will be seen, *e.g.* that Argentina and Brazil are given Judges for two years; Cuba, one year; Sweden, four years; and Spain, five years out of the six. A similar scheme was worked out for the so-called Court of Arbitral Justice, but it was not accepted.

"If a belligerent Power has, according to the rota, no Judge sitting in the Court, it may ask that the Judge appointed by it shall take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the Judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the Judge appointed by the other belligerent (Art. 16 of 12 H. C.)."

taken part in the case as counsel or advocate for one of the parties.

" No Judge or Deputy Judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever (Art. 17)." [32]

" The belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision. A neutral Power which is a party to the proceedings or whose nation is a party, has the same right of appointment. . . (Art. 18)." [33]

529. **The Seat of the Court.** — " The seat of the International Prize Court is at The Hague, and it cannot, except in the case of compulsion (*force majeure*) be transferred elsewhere without the consent of the belligerents (Art. 21)." [34]

530. **Language.** — " The Court determines which language it will itself use and what languages may be used before it.

" In all cases the official language of the National Courts which have had cognizance of the case can be used before the Court (Art. 24)."[35]

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[32] 12 H. C., 17. *Cf.* 1 H. C. (1907), Art. 62, par. 3.

[33] *Ibid.*, 18. Article 18 adds: "If in applying this last provision more than one Power is concerned, they must agree among themselves, if necessary, by lot, on the officer to be appointed."

"The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in the case the votes are equal, by lot (Art. 19 of 12 H. C.)."

"The judges of the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem [approximately $40].

"These payments are included in the general expenses of the Court dealt with in Article 47, and are paid through the International Bureau established by the Convention of the 29th July, 1899.

"The Judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court (Art. 20)."

[34] 12 H. C., 21. *Cf.* 1 H. C. (1907), 60.

"The Administrative Council fulfils the same functions with regard to the International Prize Court as with regard to the Permanent Court of Arbitration, but only members of Contracting Powers shall be members of it (Art. 22)." *Cf.* 1 H. C. (1907), 49.

"The International Bureau acts as registry to the International Prize Court, and must place its offices and staff at the disposal of the Court. It has the custody of the archives and carries out the administrative work.

"The Secretary-General of the International Bureau acts as Registrar.

"The necessary secretaries to assist the Registrar, translators and shorthand writers are appointed and sworn in by the Court (Art. 23)."

531. **Special Agents and Counsel.** — "Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests (Art. 25)."[36]

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[35] 12 H. C., 24. *Cf.* 1 H. C. (1907), 61.

[36] *Ibid.*, 25. *Cf.* 1 H. C. (1907), 62.

"A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the Contracting States, or a lawyer practicing before a similar Court, or lastly, a professor of law at one of the highest teaching centers of those countries (Art. 26)."

"For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

"Requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

"The Court is equally entitled to act through the Power on whose territory it sits (*cf.* 1 H. C., 1907, Art. 76).

"Notices to be given to parties in the place where the Court sits may be served through the International Bureau (Art. 27)."

The important points in the *procedure* to be followed before the International Prize Court may be thus briefly summarized: Appeal is "entered by means of a written declaration made in the National Court which has already dealt with the case, or addressed to the International Bureau," entry by telegram being permitted in the latter case. The period within which the appeal must be entered is fixed at 120 days (Art. 28).

The procedure "comprises two distinct phases; written pleadings and oral discussions" (Art. 34). After the close of the pleadings, a public sitting is held on a day fixed by the Court. At this sitting the parties state their view of the case both as to the law and as to the facts" (Art. 35). "The discussions take place in public, subject to the right of a Government which is a party to the case to demand that they be held in private" (Art. 39).

"The Court considers its decisions in private and the proceedings remain secret. All questions are decided by a majority of the Judges present" (Art. 43). "The judgment of the Court must state the reasons on which it is based" (Art. 44). "The judgment is delivered in open court" (Art. 45), and "each party pays its own costs," though "the party against whom the Court decides bears in addition the costs of the trial" (Art. 46). Certain duties conferred upon the Court may be discharged by a delegation of three judges appointed by it (Art. 48). "The Court itself draws up its own rules of procedure which must be communicated to the contracting Powers," and it may "prepare modifications in the provisions of the present Convention concerning procedure" (Arts. 49–50).

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For the full texts of these *Rules of Procedure*, together with the "Final Provisions" (Arts. 51–57), see Higgins, 418 ff; or Scott, *Text*, etc. 302–315. For a good summary see Scott, in 5 *A. J.* (1911), 320 ff.

"The present Convention does not apply as of right except when the belligerent Powers are all parties to the Convention" (Art. 51). It "shall remain in force for twelve years from the date at which it comes into force," and "shall be renewed tacitly from six years to six years unless denounced" (Art. 55).

"The Convention has been signed by all the Powers represented at the Conference except Brazil, China, Dominica, Greece, Luxemburg, Montenegro, Nicaragua, Roumania, Russia, Servia, and Venezuela. . . . Eleven States, therefore, have not signed the Convention, and ten more have refused to accept the composition of the Court under Article 15." Higgins, 442.

By consulting the "Table of Ratifications" in 5 *A. J.* (1911), 769–770, it will be seen that at that time only a few States had ratified the Twelfth Convention for the Establishment of an International Prize Court. These were Guatemala, Haiti, Mexico, and Salvador. However, the Senate of the United States advised and consented to the ratification of this Convention on February 15, 1911. Scott, in 5 *A. J.* (1911), 302.

* 7 Moore, *Digest*, §§ 1199 ff.; * 2 Oppenheim, Pt. III, ch. 6; 2 Ortolan, 214–245; Perels, §§ 52–55; 3 Phillimore, Pt. 10, chs. 3; 2 Rivier, 423–428; * Scott, *Cases*, 858–898; * Stockton's *Naval* (*U.S.*) *War Code*, Arts. 30–33, 46–50; Taylor, Pt. V, ch. 8; Testa, 230–242; 2 Twiss, §§ 91–97; Vattel, liv. III, § 114; 3 Wharton, ch. 16; Wheaton, §§ 524–537; Wilson, ch. 23; Woolsey, §§ 208 ff.

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For fuller Bibliographies, see Bonfils, De Boeck, Olivart, Ozanan, and Wehberg.

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